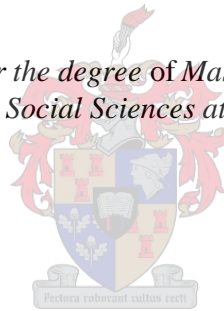


# **Justice as fairness and property rights: beyond property-owning democracy**

by

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## Abstract

The aim of this thesis is to place the debate about the relationship between property rights and justice as fairness on a new footing. I begin by exploring Rawls's argument that justice as fairness is compatible with both a system of private property rights and a system of collective ownership, before shifting the focus to Rawls's favoured regime type, namely property-owning democracy. This is a regime type in which property is privately held, but widely distributed. Rawls opts for property-owning democracy, in part, to show that contemporary capitalist welfare states, which also allow the private ownership of property, do not meet the requirements of justice as fairness. In the first part of the thesis, I argue that (i) the methodology behind Rawls's appeal to property-owning democracy as a regime type is flawed and (ii) the core features of property-owning democracy – that property be both privately owned and widely held – conflict with one another. Having shown that Rawls's understanding of the relationship between private property rights and justice as fairness fails, I present an alternative approach. First, I argue that the idea of a property-owning democracy should be abandoned and that theorising about the appropriate institutions for a just basic structure must be grounded in the specific circumstances of a given society. This implies that devising just institutions is a matter of non-ideal, rather than ideal theory. If this argument is accepted, it implies that institutions are always only provisionally just. Changing circumstances might require that the institutions of the basic structure be altered in order to maintain background justice. Next, I show that it is possible to justify private property rights within the framework of justice as fairness only if they form part of a larger set of interlocking institutions. Following this, I argue that, if private property can only be justified in this way, and if the institutions of the basic structure may have to be periodically altered, this has implications for the way in which distributive justice is dealt with within justice as fairness. I conclude that the use of pure procedural justice to settle questions about what constitutes a just distribution must be abandoned and replaced with imperfect procedural justice in order to deal with my findings about how the justness of the basic structure can be maintained over time. The notion of imperfect procedural justice offers proponents of justice as fairness a more viable approach to the difficult questions of distributive justice.

## Opsomming

Die doel van hierdie tesis is om die debat oor die verband tussen privaat eiendomsregte en geregtigheid as billikheid op 'n nuwe grondslag te plaas. Ek begin met 'n ondersoek na Rawls se argument dat geregtigheid as billikheid versoenbaar is met beide 'n stelsel van privaat eiendomsregte sowel as 'n stelsel van kollektiewe eienaarskap, alvorens ek die fokus na Rawls se voorkeur regime-tipe verskuif, naamlik eiendomsbesittende demokrasie ("property owning democracy"). Dit is 'n regime-tipe waarbinne eiendom privaat, maar wydverspreid, besit word. Rawls kies vir eiendomsbesittende demokrasie ten dele om te bewys dat die kapitalistiese welsynstaat, wat ook die privaatbesit van eiendom toelaat, nie die vereistes van geregtigheid as billikheid nakom nie. In die eerste deel van die tesis, argumenteer ek dat (i) die metodiek agter Rawls se gebruik van eiendomsbesit demokrasie as 'n regime-tipe gebrekkig is en (ii) die kerneienskappe van eiendomsbesittende demokrasie – dat eiendom beide privaat en wydverspreid besit kan word – in konflik met mekaar staan. Nadat ek veruidelik het hoekom Rawls se begrip van die verwantskap tussen privaat eiendomsregte en geregtigheid as billikheid faal, bied ek 'n alternatiewe benadering aan. Ek argumenteer eerstens dat die idee van eiendomsbesittende demokrasie laat vaar moet word, en dat die voorwaardes vir geregtigheid waaraan instellings moet voldoen aan die spesifieke omstandighede van 'n gegewe samelewing gemeet moet word moet word. Dit impliseer dat die ontwerp van regverdige instellings 'n saak vir nie-ideale, eerder as ideale teorie is. Indien hierdie argument aanvaar word, impliseer dit dat instellings altyd slegs tydelik geregtig is. Veranderende omstandighede mag verg dat die instellings van die basiese struktuur aangepas moet word om agtergrond-geregtigheid in stand te hou. Vervolgens bewys ek dat dit slegs moontlik is om die reg tot privaateiendom as deel van geregtigheid as billikheid te hanteer in soverre die instelling van eiendom deel uitmaak van 'n groter stel aaneengeskakelde instellings. Ek demonstreer verder dat, indien privaateiendom slegs op hierdie gronde regverdig kan word, en indien die instellings van die basiese struktuur periodiek aangepas moet word, dit implikasies inhou vir die manier hoe distributiewe geregtigheid binne regverdigheid as billikheid hanteer word. Ek kom tot die gevolgtrekking dat die gebruik van suiwer prosedurele geregtigheid laat vaar moet word en met imperfekte prosedure-geregtigheid vervang moet word, ten einde met my bevindings te handel oor hoe die regverdigheid van die basiese struktuur met die verloop van tyd onderhou kan word. Die gebruik van die idee van imperfekte prosedure-geregtigheid is van waarde, in soverre dit aan voorstanders van geregtigheid as billikheid 'n nuwe en meer sinvolle manier bied ten einde moeilike vrae van distributiewe regverdigheid te benader.



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## **Declaration**

By submitting this thesis/dissertation, I declare that I understand what constitutes plagiarism, that the entirety of the work contained therein is my own, original work, that I am the sole author thereof (save to the extent explicitly otherwise stated), that reproduction and publication thereof by Stellenbosch University will not infringe any third party rights, and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Date: March 2017

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Our property is nothing but those goods, whose constant possession is establish'd by the laws of society; that is, by the laws of justice. Those, therefore, who make use of the words property, or right, or obligation, before they have explain'd the origin of justice, or even make use of them in that explication, are guilty of a very gross fallacy, and can never reason upon any solid foundation. A man's property is some object related to him. This relation is not natural, but moral, and founded on justice. 'Tis very preposterous, therefore, to imagine, that we can have any idea of property, without fully comprehending the nature of justice, and shewing its origin in the artifice and contrivance of man. The origin of justice explains that of property. The same artifice gives rise to both.

David Hume, *A Treatise of Human Nature* (1738)

## Introduction

In *A Theory of Justice* (1971) and *Political Liberalism* (1993), John Rawls assumes that there is as yet no fixed agreement about how the institutions that govern the basic structure of society are to be set up so as to protect the liberty of citizens and advance the ideal of equality (Rawls 1993: 4).<sup>1</sup> With the publication of *Justice as Fairness: A Restatement* in 2001, Rawls attempts to give a clearer picture of the institutions needed in a constitutional democracy if they are to allow for fair cooperation between citizens regarded as free and equal. One of the main aims of this text is to make clear that justice as fairness cannot be used to justify the contemporary welfare-state. In *A Theory of Justice*, Rawls leaves the question open as to what regime type would best satisfy the requirements of justice as fairness. In *A Restatement* he argues that the institutions of the modern welfare-state fail to embody the principles of justice that he advocated in his earlier work. His chief criticism of what he calls ‘welfare-state capitalism’ (WSC) is that it does not recognise the principle of reciprocity in the regulation of social and economic inequalities (Rawls 2001: 138).

Rawls’s insistence that welfare-state capitalism does not embody his principles of justice has spurred a considerable amount of work on the part of contemporary political philosophers. Most of this work has focused on a regime type called property-owning democracy (POD). This is one of the two types of regime (the other being market socialism) that Rawls argues could embody the principles he laid out in *A Theory of Justice*. The origin of POD can be traced back to Aristotle,<sup>2</sup> but Rawls takes his cue from James Meade, a left-liberal British economist, who won a Nobel Prize for his work on international trade. The problem that vexed Meade was how to distribute the returns on capital in a society in which the ownership of productive wealth is very unequally distributed. He poses the following question:

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<sup>1</sup> Rawls writes that there is no agreement about “the way the basic institutions of a constitutional democracy should be arranged if they are to satisfy the fair terms of cooperation between citizens regarded as free and equal. This is demonstrated in the deeply contested ideas about how the values of liberty and equality are best expressed in the basic rights and liberties of citizens so as to answer the claims of both liberty and equality” (Rawls 1993: 4).

<sup>2</sup> Aristotle recognises the problems that a highly unequal distribution of wealth and power would create, but is also aware of the difficulty in finding a way to deal with these problems. Writing in *The Politics*, he discusses the problem at length. He argues that “it is not enough for a legislator to equalize property-holdings; he must aim at fixing an amount mid-way between extremes. But even if one were to fix a moderate amount for all, that would still not answer the purpose; for it is more necessary to equalize appetites than property, and that can only be done by adequate education under the laws” (Aristotle, *Pol.* II, 1266b20-22).

What shall we all do when the output per man-hour of work is extremely high but practically the whole of the output goes to a few property owners, while the mass of workers are relatively (or even absolutely) worse off than before? (Meade 1964: 26)

Rawls does not delve into the various other economic questions that interest Meade, but he does take note of some of Meade's suggestions for dealing with the aforementioned problem.<sup>3</sup> The main idea that Rawls takes from Meade is that of an economic system in which the ownership of private property is widely distributed and relatively equally held. The benefits of a more egalitarian distribution of property is that it insulates the political system against the corrupting influence of large concentrations of wealth and secures a measure of independence for individuals, both from the state and from their fellow citizens. Property ownership is therefore not only a vehicle for the distribution of income and wealth, but also social status:

A man with much property has great bargaining strength and a great sense of security, independence, and freedom and he enjoys these things not only vis-à-vis his propertyless fellow citizens but also vis-à-vis the public authorities. He can snap his fingers at those on whom he must rely for an income; for he can always live for a time on his capital. The propertyless man must continuously and without interruption acquire his income by working for an employer or by qualifying to receive it from a public authority. An unequal distribution of property means an unequal distribution of power and status even if it is prevented from causing too unequal distribution of income. (Meade 1964: 41)

In light of the above, property-owning democracy is attractive to Rawls in so far as it promises to secure the liberties demanded by the first principle as well as the equality required by the second, while avoiding the shortcomings of the welfare-state. Given this apparent promise, it is not surprising that property-owning democracy has become a topic of interest for Rawls scholars, particularly those working in the United States.

Contemporary philosophers working on POD, (e.g. O'Neill 2012; Williamson 2009 & 2012; Hsieh 2012 and Freeman 2013) have all tried to flesh out Rawls's few tentative remarks about

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<sup>3</sup> The problem identified by Meade has returned to the public spotlight with the publication of Thomas Piketty's *Capital in the 21<sup>st</sup> Century*. Piketty's argument is that over the long term the return on capital exceeds the return on labour. Over a long period, this can lead to significant levels of inequality between those who own capital and those who do not due to the way in which the differing rates of return are compounded.

this regime type into a fully-fledged theory. Their aims are to work out in greater detail the features of the institutions that would constitute a POD and to demonstrate that these institutions embody the principles of justice as fairness. The discussion of POD in the academic literature has been wide-ranging and there are different ideas about how its basic institutions should function, but there is an emerging consensus that a POD will be strongly egalitarian, with significant worker control over capital and a major role for the state in the allocation and distribution of capital. In particular, it has been argued (most prominently by O'Neill 2009 and Williamson 2012) that the state must give each citizen the means to maintain a relatively equal share of what I will call economic power. Economic power is the individual's share of income and wealth and the ability to make decisions in the economic realm. The aim of much of this work (building on Rawls's limited remarks) is to sketch a model of an alternative to welfare-state capitalism. The hope is that once the right set of institutions has been identified, the question of distributive justice can be settled by pure procedural justice. In other words, once the institutions are just, the outcomes they produce, whatever they may be, will also be just.

In this thesis, I argue that Rawls's suggestion that POD is a viable alternative to welfare-state capitalism distracts us from more pressing and important questions about what justice as fairness demands in specific societies. My claim is that ideal regime types such as POD offers insufficient guidance about the specific institutional arrangements (especially with regards to property rights and other economic institutions) that would meet, or come close to meeting, the requirements of Rawls's two principles of justice. An ideal type is a description of the set of institutions that govern the basic structure of a particular type of state. For example, WSC is characterised by the private ownership of the means of production and some form of social safety net. Individual states (e.g. the US, the UK and Sweden) have broadly similar characteristics that make it possible to label them capitalist welfare states despite their differences. In the same way, it is possible to think (in an abstract way) about other sets of institutions that, when working together, would constitute a different ideal type. For example, a centrally planned economy without the political liberties would constitute what Rawls calls command socialism. He refers to states that embody these different collections of institutions as 'ideal regime types'. Rawls's argument in favour of POD relies on his general description of a set of features that he associates with this regime type. My argument is that these ideal types (especially POD) are not useful for thinking about the demands of justice, because justice depends not only on a specific set of institutions, but also on the way those institutions interact with one another and with society over time. Ideal regime types cannot capture the complexity

or the dynamic nature of specific societies. They offer a relatively simple and static picture of an ideal type of society that is of little use for those who are interested in theorising about the institutional arrangements necessary to secure background justice based on the principles of justice as fairness.

This is not to say that using ideal regime types have no use at all. My view is that they can serve as inspiration for richer, more nuanced theorising about justice in non-ideal circumstances. However, any attempt at meeting the requirements of justice as fairness must be sensitive to local conditions and focus on policies and laws that aim, not at creating a particular regime type, but at incrementally and continuously changing the institutions to ensure that background justice is maintained over time. The challenge for proponents of justice as fairness is to show how this can be done in a principled manner.

My overall concern is with how proponents of justice as fairness can best theorise about the institutions that constitute the basic structure of society. I aim to show that much of the current work on POD mistakenly assumes that the latter is the regime-type most suited to justice as fairness. Part of the mistake, I argue, is that POD theorists oversimplify the demands of justice. Most of the theorising about the institutions required for a just society tries to show why and how a POD would be an improvement over the welfare-state. By contrast, I show that, in order for us to get to grips with what is required by justice as fairness, we need to move beyond the comparison between POD and WSC. Achieving justice as fairness requires that more attention be paid to the historical and social conditions of existing societies and theorising about how changes can be made to the existing institutions in order to create a more just basic structure. Ideal regime types are of no use in this regard. I aim to show that those interested in justice as fairness need to i) abandon the use of ideal types to think about which set of institutions will bring about a just basic structure and ii) change the way the issue of distributive justice is thought about by replacing the notion of pure procedural justice with that of imperfect procedural justice.

The above argument is developed in the course of four chapters. I begin by explaining Rawls's theory of justice as fairness and discuss some of the most important concepts he employs in developing this theory. The aim of this chapter is to get a clear understanding of how the principles of justice as fairness are to be realised by the institutions that constitute the basic structure of society. After dealing with the principle of liberty and how it is supposed to be embodied in the institutions of the basic structure of society, I turn to the principle of fair

equality of opportunity (FEO) and its role in trying to equalise the opportunities available to citizens. The first chapter concludes with a more technical analysis of the difference principle, which tries to make clear its role in structuring the institutions of the basic structure. This puts us in a position to discuss how different sets of institutions can be compared with one another in order to determine which better meets the requirement of justice as fairness.

Chapter 2 examines the argument put forward by Rawls in favour of POD. To this end, I begin by clarifying the distinction between ideal and non-ideal theory, before discussing the methodology Rawls employs to make comparisons between different ideal types of regimes. Understanding the methodology behind Rawls's use of ideal regime types is key to understanding why his argument in favour of POD is ultimately unsuccessful. Once it is clear on what basis Rawls distinguishes between different regime types, I present his case against command socialism, laissez-faire capitalism and WSC. I briefly explain the shortcomings of the first two regime types, before giving a more detailed account of welfare-state capitalism. I end the chapter with a discussion of POD and raise some questions about Rawls's endorsement of this specific regime type.

In Chapter 3, I question Rawls's use of ideal regime types to embody the principles of justice as fairness. To do this, I first show that serious questions can be raised about the internal coherence of POD. My argument is that the requirement that private property be relatively equally held (which is an essential feature of POD), conflicts with two of justice as fairness's essential features –that the state not advance a particular conception of the good and that just distributive shares be determined by pure procedural justice. I begin by discussing Freeman's (2013) attempt to amend the difference principle to give more weight to the social bases of self-respect in order prevent workers in a POD from giving up their ownership rights in exchange for a greater income. Freeman considers this necessary in order to prevent an unequal distribution of property from arising. I argue that this amendment is not justified and illustrates the problem of using ideal regime types to think about what is required by justice as fairness.

Next, I discuss Williamson's (2009) attempt to sketch a picture of what POD might look like in the United States. Williamson argues that it is unlikely that the ownership of property will remain widely held over time in a system that recognises private ownership. He claims that to achieve the goals of POD it will be necessary to employ strategies usually associated with socialism, including the collectivisation of ownership. I argue that this approach does damage

to the idea of POD and once again calls into question the use of ideal types to think about justice.

In the following section, I show that one of the main features of POD, the requirement for *ex ante* allocation of resources, relies on faulty economic reasoning. For one thing, the distinction between *ex ante* ‘predistribution’ and *ex post* redistribution is nonsensical; for another, *ex ante* allocation of resources would lead to severe incentive problems. Moreover, the commitment to substantive economic equality that is an essential feature of POD is not justified by an appeal to justice as fairness. The claim here is that neither of the principles of justice as fairness requires the significantly egalitarian distribution of income and wealth – and hence of property ownership – that Rawls and other proponents of POD think it does.

In the final section of the chapter I show that discussions about POD and its merits when compared with WSC are ultimately of little practical or theoretical value. No amount of abstract reasoning about which set of institutions better promote justice as fairness will provide an acceptable answer. The only way to reason fruitfully about the particular set of institutions that promote justice as fairness is to evaluate existing institutions in specific societies and think about how they can be altered to better meet the requirements of justice as fairness. What is necessary for thinking about the connection between institutions and the principles of justice is to have a closer look at non-ideal theory. I argue that any discussion about the institutions necessary to create a just basic structure must begin with the realisation that the road taken to creating these institutions is as important as the institutions themselves.

In Chapter 4, I try to show how proponents of justice as fairness can begin to sensibly answer questions about the appropriate institutional arrangement for a given society without relying on ideal types. By way of illustration, I compare different ways of trying to justify private property rights within the framework of justice as fairness. The reason for focusing on property rights, and private property rights in particular, is that property rights play a central role in the debate about the set of institutions necessary to create a just basic structure.

To start with, I provide a definition of private property that appears to fit what Rawls describes in *A Theory of Justice* and in *A Restatement*. This is not an attempt to give the institution of private property a normative grounding. My aim is simply to establish a working definition that allows us to distinguish private property rights from collective property rights. Once we have a working definition of private property, we are in a position to evaluate arguments that attempt to justify the private ownership of the means of production and natural resources.

The first set of arguments subjected to such evaluation all try to show that the existence of private property rights makes it possible for a wider range of permissible conceptions of the good than would be possible under an alternative scheme. In this case, property rights are justified by an appeal to the liberty principle. I show that such arguments fail because these specific economic rights are not necessary for developing the moral powers of citizens; hence they cannot be basic rights.

The second type of argument that I consider is one that justifies private property by appealing to the difference principle. Here the claim is that private property leads to incentives that make it possible for a larger quantity of primary social goods to be generated over time than is possible under any other property rights scheme. I reject this argument by showing that it fails to take into account the important role that the social bases of self-respect play in the index of primary goods.

The final argument I evaluate is that private property can only be justified as part of a larger set of institutions which together maintain background justice over time. I agree with this view, and try to show that a) the decision about whether or not to permit the private ownership of the means of production and natural resources will depend on the other institutions that constitute the basic structure and b) any argument in favour of a particular system of property rights must take into account the way in which changing economic circumstances caused by that system may change the basic structure over time.

In the final section of the chapter I show that the appeal to POD as an ideal type regime raises problems for Rawls's argument that just distributive shares depend upon pure procedural justice. I argue that in order to make justice as fairness internally consistent, distributive shares should instead be determined by imperfect procedural justice. This has implications for how proponents of justice as fairness should think about the institutions which govern the basic structure of society, especially property rights.



## Chapter 1: The principles of justice

### Introduction

In this chapter I lay the groundwork necessary for an informed discussion about the relationship between Rawls's principles of justice and the institutions that constitute the basic structure of a just society. To do this, I first discuss the way that Rawls approaches the problem of justice. To begin with, Rawls recognises that there are many different ways in which the institutions that constitute the basic structure of society can be structured. This means that some set of principles is required to choose between these different institutional arrangements. Deciding on a set of principles to guide this choice is itself a difficult matter, because those deciding on the principles have an incentive to argue for a set of principles that will be to their advantage. To address these problems, Rawls uses a thought experiment called the Original Position.

To start with, I discuss Rawls's reasons for appealing to the Original Position and explain the process leading to the selection of the two principles. I discuss each principle separately and explain the ways in which it is connected to the basic structure of society. I explain what the role of the basic liberties are and how the institutions of the basic structure are meant to protect their fair value. I also explain what fair equality of opportunity is and what the role of the difference principle is in structuring the inequalities generated by the basic structure. I also attempt to clearly define what is meant by the term 'basic structure'. I end the chapter with a brief discussion of reflective equilibrium and the role it plays in reasoning about the institutions of a just society.

### 1. A fair procedure for decision-making

Rawls's aim in *A Theory of Justice* is to "generalize and carry to a higher order of abstraction" (Rawls 1999: vii) the method employed by social contract thinkers like Locke, Rousseau and Kant. His goal is to create a fair procedure for selecting the principles that govern the social contract. Rawls conceives of society as a cooperative venture in which there is an "identity of interests" (ibid. 4) but which is also characterised by conflict. Cooperation allows individuals to attain more of what they want (through combining their efforts) and brings about a greater quantity of what Rawls calls 'primary goods'. Primary goods are things that "normally have a use whatever a person's rational plan of life" (ibid. 62) might be. Rawls describes them as all-purpose goods such as rights and liberties, powers of office and opportunities and income and

wealth. These are the kinds of goods that it would be rational to want more of, irrespective of the conception of the good that a person may hold.

Rawls assumes that cooperation allows for a greater stock of these primary goods to be created than would be possible if everyone worked independently. This is a relatively uncontroversial assumption; all evidence points to the fact that cooperation and specialisation allow for greater levels of economic productivity as well as more complex forms of social association. Cooperation allows for more primary goods to be created, but this cooperation is undermined by disagreements between members of the society about who should benefit from the advantages generated by cooperation and to what end these benefits should be used. Justice is the set of principles that arbitrates between our conflicting interests and makes cooperation possible on terms that are mutually acceptable to all (Audard 2007: 30).

In short, we may say that a set of rules are needed to decide who gets what and place limits on what people can do with what they have; or as Rawls puts it: “a set of principles is required for choosing among the various social arrangements which determine this division of advantages and for underwriting an agreement on the proper distributive shares” (Rawls 1999: 4). The principles which govern this distribution are the principles of social justice – they are the means by which the just share of primary goods of each citizen is determined. Before moving to a discussion of the principles that Rawls advocates, it is important to understand how these principles are meant to influence the share of primary goods that each person receives. The way that the principles affect the lives of citizens is through the working of institutions. In the following section, I explain Rawls’s justification for arguing that institutions should be the primary focus of justice.

The principles of justice cannot directly allocate primary goods. A mechanism of some sort is required to actualise them, or to act as a means for distributing them. Rawls describes institutions as:

[A] public set of system of rules which defines offices and positions with their rights and duties powers and immunities, and the like. These rules specify certain forms of action as permissible, others as forbidden; and they provide for certain penalties and defences, and so on, when violations occur. As examples of institutions, or more generally social practices, we may think of games and rituals, trials and parliaments, markets and systems of property. (Rawls 1999: 55)

This rather broad definition is the one Rawls uses throughout his work. It covers the formal institutions that Rawls discusses, such as the constitution and different types of property regimes, as well as those institutions that cannot be formally defined in the same way, but still exert a considerable effect on the well-being of individuals, as is the case with the relationship between workers and the owners of capital. These are “the rules that structure relationships and interactions among agents” (Pogge 2007: 28). The question as to whether the institutions meet the requirements of justice is determined not by the rules themselves, but by the way in which the institution is “realized and effectively and impartially administered” (Rawls 1999: 55). This means that when we look at the extent to which institutions meet the requirements of justice, it is not enough to evaluate their formal rules; it is necessary to look at how those institutions function when used by the individuals who are subject to their rules.

Rawls is not interested in all social institutions, just those that regulate the basic structure of society. The institutions that make up the basic structure are the political constitution, the legal code, the rules governing economic relations (e.g. laws of property and contract) and the rules and norms that structure how families function (Freeman 2014). These institutions are the “primary subject of justice” (Rawls 1999: 7) because their effects are so far-reaching and inescapable. The structure of the society (both political and economic) “affect men’s initial chances in life; yet they cannot possibly be justified by an appeal to the notions of merit or desert” (ibid. 7). In other words, the basic structure of society has a significant effect on what individuals are able to do with their lives:

The social system is not an unchangeable order beyond human control but a pattern of human action. In justice as fairness men agree to share one another’s fate. In designing institutions they undertake to avail themselves of the accidents of nature and social circumstance only when doing so is for the common benefit. (Rawls 1999: 102)

The way that institutions function can be altered by the choice made by citizens. The aim of justice as fairness is to provide the principles that determine how these institutions should be structured. The most important consideration when deciding how the basic structure should work is to make sure that it does not offer advantages to some at the expense of others.

There are two main difficulties in coming up with a set of principles that are meant to regulate the basic structure of society. The first difficulty is the fact that society is not a voluntary association. This means that any set of principles that is formulated must appeal to every

member of society, irrespective of their specific situation and abilities, because there is no way in which they could simply ‘opt out’ should they find that the principles being suggested do not appeal to them. Rawls makes it clear that part of the appeal of justice as fairness is that it is meant to call forth the “willing cooperation” (Rawls 1999: 15) of all members of society, irrespective of the position in society that they occupy. The principles of justice that Rawls formulates are meant to govern the basic institutions of society in such a way that individuals accept such regulation willingly. They accept the constraints that these institutions impose because they are fair. In other words, even when institutions seem to favour some individuals in certain circumstances, all of those affected accept the outcome because the principles that animate the institutions are those that all would have chosen in conditions which everyone agreed was fair (Pogge 2007: 66). Rawls argues that “the general recognition of this fact would provide the basis for a public acceptance of the corresponding principles of justice” (Rawls 1999: 13). This means that the sense of justice which every citizen is assumed to have is able to override their individual interest and make their actions conform with the requirements of the principles of justice.

This brings us to the second difficulty facing any group that is attempting to create a set of principles that is to regulate their conduct with one another: individuals who are aware of their specific interests, motivations and abilities would necessarily attempt to formulate principles that are to their advantage. This means that under conditions where participants are aware of their interests, abilities and motivations and are striving to secure the greatest quantity of primary goods possible, it will be impossible for the parties involved to agree to a set of principles that all agree are fair.

The problem of finding a method to determine fair principles of cooperation that are not biased in favour of certain individuals and that takes into account the fact that individuals do not have the option of simply leaving their society, leads Rawls to posit what he calls a ‘veil of ignorance’. The purpose of the veil is to “make vivid to ourselves the restrictions that it seems reasonable to impose on arguments for principles of justice, and therefore on the principles themselves” (Rawls 1999: 17). The restrictions that Rawls is referring to are those that seem reasonable to accept without an appeal to further justifications, for example that each of the individuals behind the veil of ignorance are equally situated. To step behind the veil of ignorance is to enter what Rawls calls the ‘Original Position’ where rational and disinterested individuals can compare and rank various conceptions of justice.

The constraints on selecting principles of justice are those that have a basic intuitive appeal. To start with, Rawls considers it obvious that “no one should be advantaged or disadvantaged by natural fortune or social circumstances” (ibid. 18) and that no one should be in a position to influence the decision-making procedure to their advantage. Furthermore, individuals behind the veil of ignorance should not be able to formulate principles that would be advantageous for pursuing a particular conception of the good. This is necessary to meet what Rawls calls the ‘fact’ of reasonable pluralism in modern democracies (Rawls 1993: 144). Any set of principles chosen to regulate the basic structure of such a society cannot be biased in favour of a particular conception of the good. The aim of these basic restrictions is to free the participants behind the veil of ignorance from unreasonable prejudices when deciding on the principles of justice.

Additionally, the individuals behind the veil of ignorance are assumed to be free and equal. To be free, means to “view their persons as independent from and not identified with any particular conception of the good, or scheme of final ends” (Rawls 2001: 21). The individuals behind the veil of ignorance are equal as moral persons, that is, as “creatures having a conception of their good and capable of a sense of justice” (Rawls 1999: 17). What this means is that everyone is assumed to have the capacity to conceive of and pursue a particular conception of the good and that each person has a sense of justice. To have a sense of justice is to “understand, apply, and to act from (and not merely in accordance with) the principles of political justice” (Rawls 2001: 18). This sense of justice means that individuals are willing to comply with the demands of justice even when it is not necessarily to their short-term advantage.

These two moral powers animate the decision-making process behind the veil of ignorance. If everyone behind the veil of ignorance knows that:

1. they have some conception of the good,
2. having more primary goods rather than less will better allow them to pursue this good,
3. they must abide by the principles of justice that will be decided upon,

then it allows them to compare and rank competing principles of justice and make a decision as to which one it is the more rational to select.

Rawls defines rationality in the narrowest sense possible: it means nothing more than to take “the most effective means to given ends” (Rawls 1999: 14). He does add one special proviso when describing how rationality is to function behind the veil of ignorance: he assumes that individuals behind the veil of ignorance do not suffer from envy (ibid.143). This means that

the individual behind the veil of ignorance will not be affected in their choice by the relative difference in size between the index of primary goods that they may come to hold compared to the holdings of others, provided that the difference is not the result of injustice or “letting chance work itself out for no compensating social purpose” (ibid.143). Rawls does indicate that this assumption itself is bounded and that inequalities cannot “exceed certain limits” (ibid. 143). The decision-makers behind the veil of ignorance are also assumed to be risk-averse. The decision that they make about the principles chosen must conform with the maximin rule. This means that when deciding on the choice of principles, the decision-makers must first take into account the worst-case scenario that may occur for each set of principles. The set of principles that is ultimately chosen must have the least bad worst-case scenario. (Pogge 2007: 68). It is assumed that each set of principles can lead to a range of outcomes, ranging from bad to good. Minimax reasoning is a risk-averse reasoning strategy that selects the set of principles in which the worst option is better than the worst option that is possible under any other set of principles.

Part of the reason why Rawls uses the veil of ignorance as a device of representation is to provide a bulwark against objections to the very idea of justice, such as those by Marx (Rawls 2001: 121). Marx and other sceptics about justice claim that ‘justice’ is nothing more than a set of conventions structured in order to favour those in power (ibid. 79; O’Neill & Williamson 2009: 1). Understood this way, justice is merely an ideology aimed at maintaining a particular division in society. The purpose of the veil of ignorance is to remove any temptation to formulate principles that favour a particular class, gender or group in society. Those behind the veil of ignorance know only the least controversial laws of economics, psychology and science. For example, they are aware that people respond to incentives, and that what goes up must come down. By tailoring the conditions of decision-making to exclude the possibility of any individual proposing principles that are to the benefit of their particular group, Rawls counters the charge by the sceptics that ‘justice’ is simply a tool for the powerful to maintain their position of advantage.

## **2. The principles of justice**

The principles that Rawls thinks that the individuals behind the veil of ignorance will agree to be bound by, are those of justice as fairness. Formally stated, these two principles demand that:

1. Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and

2. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle<sup>4</sup>). (Rawls 2001: 53)

The first principle is prior to the second and similarly, fair equality of opportunity must be satisfied before the difference principle can be brought to bear on the problem of how to structure the inequalities that do exist. The lexical ordering of these principles plays an important role in determining how the institutions that govern society must be arranged. Most obviously, the priority of liberty means that there can be no trade-off between the basic liberties and material prosperity. To sacrifice some freedom in exchange for greater wealth is strictly prohibited. The primacy of liberty places constraints on the actions of the state. It is not permitted to limit the freedom of some citizens in order to make others, (or even everyone else) better off than they would be otherwise. Institutional arrangements which might bring about a greater level of equality, or work towards establishing fair equality of opportunity, are prohibited should they come into conflict with the basic liberties protected by the first principle.

### *The basic liberties*

Rawls argues that the basic liberties specified by the first principle can be derived in two ways. The first way involves a historical analysis of past liberal democratic regimes. By analysing these liberties protected by the more successful regimes we may deduce that these are the liberties required to sustain such regimes (Rawls 2001: 45). This option is not available to participants behind the veil of ignorance. They must rely on some other means to determine which liberties are essential. Rawls considers this can be done by determining which liberties are necessary to for the “adequate development and full exercise” (ibid. 45) of the two moral powers. There are four broad categories of liberties:

1. Equal political liberties and freedom of thought.
2. Liberty of conscience and freedom of association.
3. Freedom and integrity of the person.
4. The rights covered by the rules of law. (Pogge 2007: 83)

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<sup>4</sup> Rawls’s formulation of the two principles has changed since the publication of *A Theory of Justice* in 1971. The formulation that I use here, and make use of throughout this thesis, is the one used by Rawls in his last work, *A Restatement*, published in 2001.



The reason for choosing equal liberty and freedom of thought is to enable citizens to use their moral powers in “judging the justice of the basic structure of society and its social policies,” (Rawls 2001: 45) The liberties listed under the other three points are necessary to “develop and exercise” their moral powers in the pursuit of their conception of the good (Rawls 2001: 45). The absolute protection of these liberties, states Rawls is necessary for free and equal citizens to exercise their moral powers.

To ensure that citizens can exercise these moral powers, Rawls argues that it is necessary not only to formally guarantee political liberties of the first principle, but ensure that their fair value is respected. These political liberties are associated with the basic liberties of the first principle and can be thought of as the means whereby citizens make use of their basic liberties. Examples of political liberties that Rawls discusses (1999: 224-225) include the right to hold office, to take part in electioneering and to engage in political debate. To require that the fair value of these liberties are maintained, is in a sense to apply fair equality of opportunity to the process whereby these political liberties are exercised. In other words, those equally endowed, and with similar motivation must have a roughly equal chance to gain political office or similar opportunities to influence the outcome of an election, irrespective of their social class or wealth. This means that the institutions of the basic structure must work together to make sure that this happens. In the next chapter I discuss how this requirement plays an important role in Rawls’s argument against what he calls welfare-state capitalism.

### *Fair equality of opportunity*

The first part of the second principle of justice requires that policies must be in place and that institutions function in ways that promote fair equality of opportunity. Rawls says that fair equality of opportunity is a “difficult and not altogether clear idea” (Rawls 2001: 43) that is best understood as a corrective to the shortcoming of formal equality of opportunity. Formal equality of opportunity requires that discrimination on the basis of gender, race or some other morally arbitrary factor is not allowed. Fair equality of opportunity requires far more. Not only must positions be open to all; everyone must have a fair chance of attaining them. What this means is that those with similar talents and motivations are able to reach similar positions. This has far-reaching consequences for the institutions that govern the basic structure of society. Rawls argues that “in all parts of society there are to be roughly the same prospects of culture and achievement for those similarly motivated and endowed” (ibid. 44). This means that opportunities for education and work must be equally distributed across the social spectrum.



Justice as fairness does not allow morally arbitrary facts, such as the family or class one is born into, to be the basis for an unequal distribution of the benefits of cooperation.

Another reason for fair equality of opportunity is that it is “integral to the equal status of free and equal citizens” (Freeman 2007: 91). Rawls connects fair equality of opportunity with the primary social good of self-respect. Without fair equality of opportunity, it would be possible to exclude people from certain positions based on their social class. To experience exclusion on such a basis would constitute an attack on the dignity of the individual. Fair equality of opportunity is also required because opportunities must be made available for individuals to develop their talents on a basis of equality with others to bring about a just distribution of economic rewards. In other words, before the market (or whatever economic system is in place) can be allowed to distribute the benefits of social cooperation, policies and institutions must be in place to ensure that the requirement of fair equality of opportunity is met.

### *The difference principle*

The difference principle embodies the ideas of reciprocity and of democratic equality. Rawls writes that justice as fairness asks that “men agree to share one another’s fate” (Rawls 1999: 102). What this means is that the random and morally irrelevant basis on which talents and starting positions in life are distributed should not lead to inequalities unless those inequalities are to the benefit of all and especially to the maximal benefit of the least-advantaged. The difference principle requires us to view “the distribution of natural talents as a common asset” (ibid. 101) that must be shared fairly. The idea behind this view of natural talents is that no one deserves their talents or advantageous starting position in society. This is not to say that talents do not belong to individuals, or that the difference principle is a form of taxation that applies to those with more socially useful talents. Instead, it requires that in order for individuals to reap the rewards that their talents make possible, they must be engaged “in socially useful ways that contribute to the advantages of those who have less” (Rawls 2001: 158). To reject the difference principle would be to ask that the benefits bestowed by chance (talents, starting positions, etc.) work to make those who are already advantaged gain an even greater share of primary goods at the cost of the least-advantaged group. Behind the veil of ignorance, this would be an unreasonable choice. Rational actors making a decision under conditions of uncertainty would not select principles that allowed some to benefit from their starting positions but left the least-advantaged in a worse position than they would have been if the principle of strict equality were applied.

The reason for the strict requirement that inequalities should be to the maximum advantage of the least-advantaged is Rawls's insistence that any discussion of inequality must start from a "baseline of equality" (Freeman 2007: 190). This means that, in order for anyone behind the veil of ignorance to accept some deviation from an equal distribution, the new distribution must leave everyone better-off than they would have been under equal distribution. However, this does not yet bring us to the difference principle. Rawls argues that, in addition, it is necessary that the deviation from equality places the least-advantaged in the best possible situation that they could be in. Asking free and equal citizens of a well-ordered society to accept an alternative distribution would be unreasonable because it "would require that we distribute the result of arbitrary contingencies in ways that make those with greater income and wealth better off at the expense of the least-advantaged members of society" (Freeman 2013: 21). Rawls places an additional restriction on the distribution of income and wealth, arguing that "there is a maximum gain permitted to the most favoured on the assumption that, even if the difference principle would allow it, there would be unjust effects on the political system and the like, excluded by the principle of liberty" (Rawls 1999: 81). This proviso to the difference principle is an issue that will be discussed in greater detail in the following chapter when considering the shortcomings of welfare-state capitalism. For the moment we can set aside this worry and concentrate on the requirements of the difference principle in ideal situations:

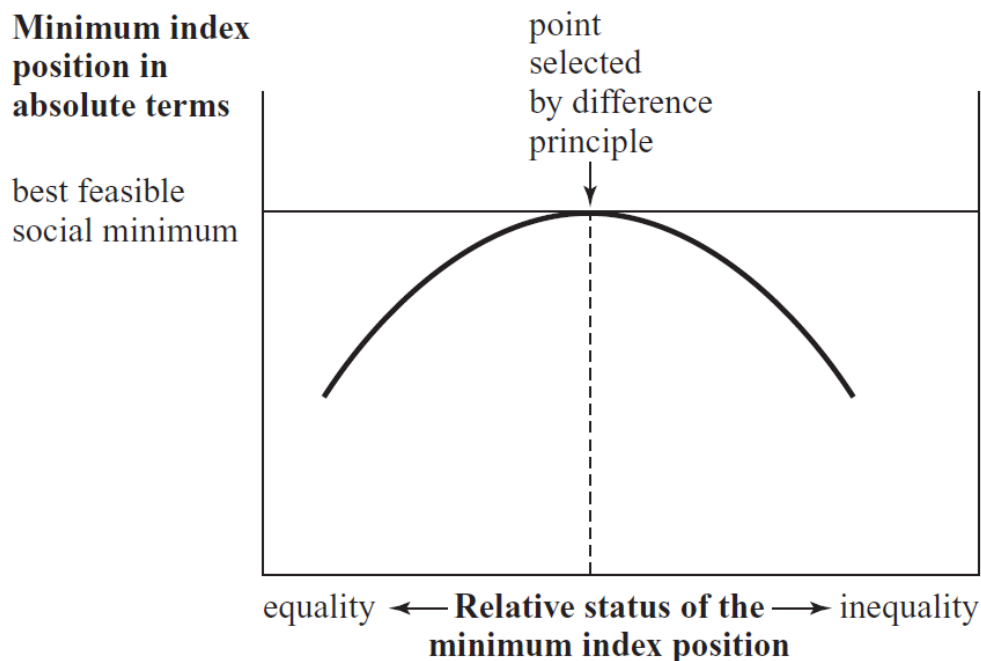


Figure 1: The difference principle (Pogge, 2007: 110)

Figure 1 illustrates the optimal level of inequality in a society. At this point, the absolute minimum index position of the least-advantaged is maximised. This means that there is no alternative arrangement that could improve the absolute quantity of primary goods that go to the least-advantaged. This is not to say that there are other arrangements with a lower level of inequality that would improve the position of the least-advantaged *relative* to most advantaged, but this arrangement cannot be chosen behind the veil of ignorance because the individuals are assumed not to be affected by envy (Pogge 2007: 110).

The graph in Figure 1 shows how the basic institutions of society should be structured in such a way that they call forth the willing cooperation of all members of society, especially the least-advantaged. Under the arrangements illustrated in Figure 1, it makes sense for everyone in society, including the least-advantaged, to cooperate, since no other arrangement would lead to the improvement of the position of the least-advantaged. At its core, the difference principle is meant to embody a form of reciprocity (Rawls 1999: 102). It is a way of appealing to every member of society to take part in social cooperation by regulating inequalities in such a way that no one can benefit from social cooperation unless it is to the benefit of the least-advantaged members of society. In this way the idea of reciprocity is built into the conception of justice as fairness.

The idea of reciprocity is especially important when considering how institutions are to maximise the long-term prospects of the least-advantaged. The least-advantaged are not candidates for charity, but rather “those to whom reciprocity is owed as a matter of basic justice” (Rawls 2001: 139). In a sense, the difference principle is a tool for tying reciprocity to the conception of justice. This becomes evident when comparing alternatives to the difference principle as a way of structuring inequalities in a society. Consider the option of using what Rawls calls “restricted utility” for structuring economic inequalities. Restricted utility recognises the lexical priority of the first principle, fair equality of opportunity and the establishment of a social minimum, but plays no role in structuring the inequalities in income and wealth which affect those above the social minimum. The idea of reciprocity does not feature in this conception of justice, because it allows gains to be made at the expense of the worst-off, provided that those gains will not lead the least-advantaged in society to fall below the social minimum (Audard 2007: 168). This is one of the problems that Rawls identifies with welfare-state capitalism. Its institutions do not recognise the requirement of reciprocity when dealing with the least-advantaged group in society, leading them to lose their sense of self-worth.

The difference principle (like the first principle and the first part of the second principle) is to be understood as applied to the institutions that determine that basic structure of society. What this means is that it is not an allocative principle. Rawls makes an important distinction between allocative and distributive justice. This is a distinction, often overlooked in discussions of social justice, but one that is essential for understanding Rawls's argument in favour of his second principle and his argument for POD as a preferable alternative to what he calls welfare-state capitalism. Allocative justice asks "how a given bundle of commodities is to be distributed, or allocated, among various individuals whose particular needs, desires and preferences are known to us, and who have not cooperated in any way to produce those commodities" (Rawls 2001: 50). In other words, allocative justice has two features, both of which have important implications for the way we think about justice. Firstly, allocative justice is concerned with giving goods to specific individuals with specific needs or desires. Secondly, the goods being distributed did not arise by means of cooperation amongst the individuals to whom they are now to be allocated. To decide on principles in order to make a decision about allocative justice is very different to deciding on principles to make a decision about distributive justice. To settle a question of allocative justice contextual information about the preferences or needs of the recipients and the quantity and type of goods to be allocated are known (Audard 2007: 101). This information is used to come to a decision about how the goods are to be divided. For example, if shipwrecked survivors on a desert island find a crate of medical supplies that has washed up on the shore, the question of how to divide such resources will be one of allocative justice.

In contrast, distributive justice, argues Rawls is concerned with regulating how the benefits of social cooperation are to be distributed over time. The question of distributive justice is the one Rawls is concerned with because of his conception of society. Rawls understands society to be a system of cooperation that exists from one generation to the next. Distributive justice is thus concerned with the rules for social cooperation over time. These rules for cooperation affect what people decide to do and what they are entitled to in light of what they have decided to do. Ultimately, "the distribution which results is arrived at by honouring the claims determined by what persons undertake to do in the light of these legitimate expectations" (Rawls 1999: 74).

Rawls thinks that in a well-ordered society in which the principles of justice have been fully realised, "the distribution of income and wealth illustrates what we may call pure background procedural justice" (Rawls 2001: 50). In other words, if the institutions that govern the basic structure of society fulfil the requirements of the two principles of justice, "the particular

distributions of goods that result are acceptable as just (or at least as not unjust) whatever these distributions turn out to be” (Rawls 2001: 50). Whatever an individual is able to attain within this framework is justly earned and there can be no claim to it on the part of any other person or the state. This is not to say that the state cannot levy taxes (it must do so in order to ensure that the principles of justice are met), but it does mean that there are no further criteria for distribution once the principles of justice have been fully met by the institutions of the basic structure.

To understand exactly how the difference principle is meant to be applied, it is worth examining G.A. Cohen’s complaint that the difference principle allows for “severe inequalities” (Cohen 2008: 183) produced by contemporary capitalism. Cohen argues that the vast inequalities that exist in contemporary capitalist welfare-states like the United States are sanctioned by the difference principle. The reason for this, says Cohen, is that if it could be shown that the inequality makes those who are the least-advantaged better off than they would be had the inequality not existed, then the difference principle demands that the inequality be permitted. Cohen understands the difference principle as an allocative principle, which determines the level of inequality that will distribute maximum rewards to the least-advantaged, irrespective of the effect that the distribution may have on the other groups in society.

Cohen’s understanding of the difference principle appears to be based on a superficial reading of Rawls. When Rawls presents the difference principle, he makes it clear that it is not meant to apply to *existing* institutions. Rather, we must think of how individuals behind the veil of ignorance would create institutions that comply with the principles of justice. In other words, only once the basic structure of society already conforms with the requirements of both principles, can the difference principle be brought to bear on the inequalities that do exist. Rawls argues that liberties protected by the first principle and the broad range of opportunity created by the requirement of fair equality of opportunity will already limit inequality to a great extent. Furthermore, the difference principle dictates that “social and economic policies be aimed at maximising the long-term expectations of the least-advantaged” (Rawls 2001: 55). This means that it cannot be used to justify policies that allow for great inequalities in income and wealth if they only improve the lot of the least-advantaged in the short-run.

This is not to say that the difference principle plays no role in determining the appropriate level of taxation: it does, but not in the sense that the specific level of taxation must continually be adjusted to meet the requirements of the difference principle. Rawls thinks that this is neither

feasible nor practical because it is impossible to know what the exact effects of a specific policy will be (ibid. 162). Given that the difference principle is so important it might be asked why Rawls does not include it as something which should be guaranteed by the constitution, much like the liberties of the first principle. The reason for not doing this is because determining whether its requirements have been met “requires a full understanding of how the economy works and is extremely difficult to settle with any exactness” (ibid. 162). Making the difference principle a constitutionally guaranteed requirement of state policy would leave it to the courts to decide whether or not it has been met. Rawls argues that this is not a task for which the courts are suited.

To attempt to rectify earlier misunderstandings of the difference principle, Rawls writes in *A Restatement* that it is incorrect to understand justice as fairness’s commitment to equality solely on the basis of the difference principle:

It is sometimes objected to the difference principle as a principle of distributive justice that it contains no restrictions on the overall nature of permissible distributions. It is concerned, the objection runs, solely with the least-advantaged. But this objection is incorrect: it overlooks the fact that the parts of the two principles of justice are designed to work in tandem and apply as a unit. The requirements of the prior principle have important distributive effects. Consider the effects of fair equality of opportunity as applied to education, say, or the distributive effects of the fair value of political liberties. We cannot possibly take the difference principle seriously so long as we think of it by itself, apart from its setting within prior principles. (Rawls 2001: 46)

Taking the principle of liberty and the requirement of fair equality of opportunity seriously, says Rawls will have significant effects on inequality. Once these principles are realised, the difference principle is meant to apply to the inequalities that remain. In other words, the difference principle is not the first point of departure for discussing the extent of justice as fairness’s commitment to equality.

The difference principle itself also contains a strong egalitarian component in that it incorporates elements of what Rawls calls the principle of redress. This is the principle that “undeserved inequalities call for redress; and since inequalities of birth and natural endowment are undeserved, these inequalities are to be somehow compensated for” (Rawls 1999: 86). The principle of redress is closely connected with what has been termed ‘luck egalitarianism’. Luck

egalitarians<sup>5</sup> argue that individuals should be held responsible for the outcomes of their conscious decisions, but that outcomes that are a result of luck need to be equalised in some way.

Rawls's principle of redress comes close to this requirement when he argues that "in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and those born into the less favourable social positions" (Rawls 1999: 86). The aim here is to diminish the effect of fate. The difference principle incorporates an element of the principle of redress in the way that it deals with the natural inequalities between individuals, but justice as fairness is not a luck egalitarian conception of justice. Those who have been fortunate to receive talents or natural attributes that are favourable can only gain from them if they do so in a way that benefits the rest of society, especially the least-advantaged. It does not require that policies be put in place to redistribute undeserved luck to those who have relatively less of it.

### **3. Making judgements about justice**

The interaction between the basic liberties guaranteed by the first principle and the requirements of the two parts of the second principle are complex. The principles do not stand on their own. Despite the lexical priority of the first principle the principles must be understood as working together to influence the institutions that make up the basic structure of society. It is also important to understand that the justice of particular institutions cannot be determined independently of the way they work together to affect the basic structure of society. When attempting to determine whether a particular set of institutions meets the requirements of justice as fairness, we have to weigh up the different institutions that make up the set against one another. For example, the institution of private property is likely to have certain effects on the way that income and wealth are distributed in society, but just as important are the rules that regulate how property can be transferred (i.e. tax policy). The question as to which set of institutions to select is made on the basis of the quantity of primary goods that they produce. Rawls uses the term "primary social goods" as a collective name for the kind of goods that a person would want to have, irrespective of their conception of the good.

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<sup>5</sup> Luck egalitarians argue that it is the role of distributive justice to reallocate the unearned advantages held by some to those who are relatively less advantaged. Those who earn their relatively more advantageous position through their own actions can have no claim against them. See for example Anderson (1999) for a discussion and criticism of this approach to social justice.



The primary goods can be thought of as bundles of resources and are meant to serve as a measurement for making comparisons between people, without looking specifically at what people can actually do with them. Rawls's primary social goods can be divided into five categories:

1. The basic liberties: freedom of thought and liberty of conscience, etc.
2. Freedom of movement and free choice of occupation against a background of diverse opportunities are required for the pursuit of final ends as well as to give effect to a decision to revise and change them, if one so desires.
3. The powers and prerogatives of offices and the responsibility that is needed to give scope to various self-governing and social capacities of the self.
4. Income and wealth, understood broadly. These are all-purpose means (having an exchange value) for achieving directly or indirectly a wide range of ends, whatever they happen to be.
5. The social bases of self-respect. These are the aspects of basic institutions that are normally essential if citizens are to have a lively sense of their own worth as moral persons; be able to realise their highest order interests; and; advance their ends with self-confidence. (Rawls 2001: 58-61)

Each person can be thought of as having a bundle of these goods. We can convert this bundle of goods into an index-value, which allows interpersonal comparisons to be made. The aim of using an index is to establish a tool for making interpersonal comparisons possible. One of the problems with using the index is that Rawls gives "no indication how the underlying goods are to be quantified and how such quantities are to be aggregated into a single index number for each person" (Pogge 2007: 107). This raises some difficult questions about the practical use of the index in non-ideal theory. I set aside this question for now, but will return to it in the following chapters.

The goods on the list are meant to be all-purpose so that they may be used to pursue a variety of different conceptions of the good, provided that such conceptions are not illegitimate. For an individual to have a conception of the good means that they have the capacity to formulate and pursue what they consider to be valuable and to revise this conception in light of new information or changing circumstances. For Rawls's purposes, only the last three items on the list are important for constructing an index; the first two are based on the requirements of the first principle and they cannot be exchanged for greater access to the other primary goods



(Rawls 1999: 93). In other words, it is not possible to exchange any political liberties in order to gain a greater share of income and wealth.

When we attempt to determine whether society is treating individual citizens in accordance with the requirements of justice as fairness, we compare the access of citizens to primary social goods over the course of their lives. What is important about primary social goods is not what people actually do with them, or what satisfaction they get from them, but rather what they *could* do with them. In other words, it is the responsibility of each individual to decide what to do with their share of primary social goods. The fact that they may achieve differing levels of satisfaction or welfare from them is irrelevant. Rawls makes it clear that individuals are responsible for their conception of the good and must adjust their conception if they need to:

Justice as fairness ... does not look behind the use which persons make of the rights and opportunities available to them in order to measure, much less to maximise, the satisfactions they achieve. Nor does it try to evaluate the relative merits of different conceptions of the good. Instead, it is assumed that the members of society are rational persons able to adjust their conceptions of the good to their situation. (Rawls 1999: 94)

If individuals were not responsible for their conceptions of the good it would lead to the problem of expensive tastes. To illustrate: if A and B both get the same quantity of primary social goods, but B is much more difficult to satisfy than A, then to achieve the same level of satisfaction or functioning, B will require a much greater share of primary social goods. B is only happy with champagne and caviar, while A is satisfied with a jam sandwich. From the perspective of social justice, the question is whether B is entitled to a greater share of primary social goods than A. Rawls adopts the position that those with expensive tastes are not entitled to a greater share. The ability of the individual to convert primary social goods into ends that they have reasons to value cannot play a role in distributive justice.

Rawls adopts this position because he has a ‘thin’ theory of the good in which the state does not take a position on what the good of each individual should be (Mandle 2009: 86). The primary goods are meant to be all-purpose goods that anyone would want irrespective of their particular conception of the good. He argues that going further and establishing a set of criteria which the state must aim to achieve for all citizens, violates the individual’s choice to pursue their own conception of the good. The reason for adopting this approach is because justice as

fairness is a political conception<sup>6</sup> of justice for a democratic society. What this means is that the conception of justice he puts forward is animated by the idea that citizens are free and equal and that cooperation will be regulated by fairness. It respects the autonomy of the individual to decide on their own conception of the good and the best way of attaining it.

#### 4. Reflective equilibrium

Rawls argues that arriving at a considered judgement about the principles that regulate the way the basic structure should be arranged is one of the main aims of political philosophy (Rawls 2001: 4). Rawls thinks that the means whereby we can reach a considered judgement is by a process called reflective equilibrium. The method by which reflective equilibrium is attained is a two-way process in which individuals attempt to achieve consistency between their views about specific issues relating to political justice and the abstract principles which inform their view of justice. The individual attempting to reach reflective equilibrium starts by evaluating the moral judgements that they are most confident about. These are judgements that have been made after deliberation and under favourable conditions. Rawls uses the example of an umpire or a judge as someone who makes decisions under favourable conditions where there is no temptation to make a judgement in a biased manner. These specific judgements serve as fixed points, which then serve as a basis for bringing the more abstract moral views of the individual into a coherent web of belief. Once coherence has been achieved between the particular moral judgements and the more abstract views about justice, the individual has reached what Rawls refers to as narrow reflective equilibrium (Rawls 2001: 30).

To move from narrow to wide reflective equilibrium it is necessary for the individual to be exposed to the main theories of political philosophy and justice. This is the process whereby individuals must constantly update their beliefs as they are exposed to new ideas about justice. The process of achieving wide reflective equilibrium is thus an ongoing one in which no particular conception of justice can be accepted as final. In principle it is always possible to revise one's commitments to a particular conception of justice in light of new information that allows for a greater level of coherence between the considered individual judgements and a

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<sup>6</sup> Rawls's defense of justice as fairness as a political conception was first set out in a 1985 article entitled: "Justice as Fairness: Political, not Metaphysical." In this article Rawls tries to make clear that the conception of justice that he has set out, is "so far as possible, independent of controversial philosophical and religious doctrines" (1985 223). This is the conception of justice that is evident in his subsequent works (*Political Liberalism* and *Law of Peoples*) and which is at the center of his approach to justice as fairness in *A Restatement*.

more abstract moral view. This openness to revision “illustrates that for Rawls constructing and defending a conception of justice is a practical undertaking” (Mandle 2009: 46). Testing the principles of justice against real and hypothetical examples is thus an important part of gaining confidence about the justness of the theory.

The use of the veil of ignorance is itself part of the process that is intended to make progress toward wide reflective equilibrium possible (Audard 2007: 130). The conditions under which individuals must select the principles of justice are meant to make unbiased decision-making possible. The constraints under the veil of ignorance mean that individuals are able to test their considered moral convictions against various sets of moral principles without being influenced by how those principles will affect them personally. This allows the principles of justice as fairness to be compared in a pair-wise fashion with alternative accounts of justice, like utilitarianism, in a way that makes it easier to determine which moral view better coheres with our considered moral judgements.

## **Conclusion**

In this chapter I explained how the principles of justice as fairness are derived behind the veil of ignorance and how these principles are to be embodied in the institutions of the basic structure of society. I have tried to connect as clearly as possible the normative requirements of the principles with the institutions necessary to give form to them. The aim of this explanation is to provide a sound foundation for understanding the arguments in the next chapter. These arguments concern the compatibility of the conception of justice as fairness with various ideal regime types.

I have also tried to show how judgements about the justness about various institutional arrangements can be made by comparing the index value of the least-advantaged group under each set of institutions. This puts us in a position to address some of the questions raised in chapters 3 and 4, where specific institutional arrangements are contrasted with one another. Furthermore, I made clear the role that the difference principle plays in justice as fairness. This puts us in a good position to deal with complicated questions about the connection between distributive justice and the institutions of the basic structure that will be dealt with in the last chapter.

## Chapter 2: Regime types and justice

### Introduction

The aims of this chapter are, first, to investigate Rawls's criticisms of the welfare-state and to determine to what extent they are justified; and second, to investigate the method Rawls uses to compare and contrast various regime types (including welfare-state capitalism) with property owning democracy. I begin by focusing on the methodology behind Rawls's depiction of five ideal-type regimes, after which I briefly discuss each of these regime types and its relation to the requirements of justice as fairness.

In the second part of the chapter, I deal at length with the arguments that Rawls puts forward in an attempt to show that WSC cannot meet the requirements of justice as fairness. His criticisms fall into four broad categories. He claims that WSC: i) cannot guarantee the fair value of the political liberties; ii) cannot guarantee true fair equality of opportunity; iii) does not recognise the principle of reciprocity; iv) is unstable. I show that the first two criticisms are not successful, but that the other two criticisms do raise serious questions about WSC. This will put us in a position to evaluate the arguments for and against POD in the following chapter. Understanding why these arguments are successful helps to make it clear why POD seems so attractive to proponents of justice as fairness.

In the final part of the chapter, I discuss the aims and institutions of POD. I offer a sympathetic reading of some of the proposals that attempt to show that POD is compatible with justice as fairness before looking more closely at the specific institutions associated with this regime type. I end with a brief summary of what can be thought of as the essential features of POD.

### 1. Rawls's methodology

To begin with, I examine the methodology that Rawls employs to contrast five different regime types he discusses in Part IV of *A Restatement* (Rawls 2001: 138). The five regime types are:

1. Laissez-faire capitalism
2. Welfare-state capitalism
3. State socialism with a command economy
4. Property-owning democracy
5. Liberal (democratic) socialism

Rawls describes each regime type and a few of the basic institutions associated with each, before delivering a verdict as to whether or not the regime meets the requirements of justice as fairness. The main reason for the evaluation is to bring into sharper focus those institutions which are most likely to “secure background justice over time” (Rawls 2001: 135). Using ideal regime types to think about how the principles of justice might be manifested by a particular set of institutions is also a way of reaching wider reflective equilibrium about the principles of justice.

The regime types Rawls discusses are not abstractions of particular regimes that actually exist. For example, his description of liberal socialism should not be thought of as being aligned with any state that exists or has existed, such as Sweden or any other Scandinavian country. Rather, a regime type should be thought of as a “description of how it works when it is working well, that is, in accordance with its public aims and principles of design” (ibid. 137). In other words, the institutions of the various regime types are assumed to work successfully in achieving the aims towards which they strive.

This method of describing the various regime types in terms of the sets of institutions that constitute them can be seen as an extension of the method he uses to discuss institutions in *A Theory of Justice*. When discussing institutions in general, he views them in terms of the “constitutive rules” (Rawls 1999: 56). These are the rules which determine how rights and duties are formally allocated. Games are a useful analogy for understanding institutions. For example, in chess, each piece can only be moved in a certain way. There is a rule for moving each piece on the chessboard; taken together these rules constitute the game of chess. The actual strategies used by players of the game do not affect the status of the institutions. To better understand Rawls’s description of these ideal types we may assume that the rules of chess are analogous to the institutions of a society. Taken together, the set of rules constitutes the game of chess; in the same way Rawls takes a collection of institutions to constitute a particular regime type. For example, when discussing laissez-faire capitalism Rawls refers to a number of institutions, such as the free market and right to private property, which, taken together, constitute the regime type he calls laissez-faire capitalism. The use of ideal types is closely linked to Weber’s use of what he termed ‘pure ideal types’ that offers a description of a type of institutional arrangement that abstracts away from the particulars of each instance of this type in order to make inferences about how these types might respond in particular situations (Weber 1968: 20-21).

The ideal descriptions of the various regime types can be thought of as containing two parts: the aims of the regime and the institutions of the regime (Weithman, 2013). On the one hand, there is the aim of the system itself – the objectives that it aims to achieve or values that it expresses. On the other hand, the ideal type is characterised by the ideal description of the institutions that constitute it, such as markets, private property, taxation, etc. When Rawls uses the term ‘ideal regime type’ he is combining both of these features. Understanding the interactions between the various institutions that constitute different regime types enables us to evaluate the extent to which each regime type conforms with the requirements of justice as fairness.

Crucial to understanding Rawls’s approach here is to see that he is not evaluating the individual institutions that constitute a particular regime type; he is evaluating the way that these institutions function together as a collective. The reason for doing this is to evaluate the justice of the basic structure of society as a whole. Rawls is not concerned with particular institutions – his interest is in how they all ‘hang together’. Rawls argues that “it is conceivable that a social system may be unjust even though none of its institutions are unjust taken separately: the injustice is a consequence of how institutions are combined to form a single system” (Rawls 1999: 57). Take for example the institution of private property: it is impossible to know whether private property conforms with the requirements of justice independently of the other institutions that affect how property is transferred or which determine its distribution. This is why it is necessary to view the collection of institutions as a whole, rather than individually.

An immediate concern that can be raised about this approach is that Rawls is making things too easy for himself. If he wishes to argue in favour of the superiority of POD over WSC (or any other regime type), surely he should be arguing against actual existing forms of the welfare-state, rather than the somewhat uncharitable description of the welfare-state that he presents? The version of the welfare-state that he puts forward makes him vulnerable to the charge that he is setting up a straw man, only to conveniently knock it down with his POD. If the arguments against welfare-state capitalism are to be convincing, then they must be directed against the welfare-state itself, not the version of it put forward by Rawls. However, this is perhaps being too harsh. There are clear links between the ideal types put forward by Rawls and existing regimes. In fact, when thinking about the ideal types put forward by Rawls it is easy to draw parallels between such types (on the basis of the institutions that animate them) and existing states. For example, North Korea appears to embody many of the features associated with state socialism.

Part of the reason that Rawls makes use of ideal regime types is because matching the ideal descriptions with existing regimes is useful for evaluating the extent to which the regime meets or falls short of the requirements of justice as fairness. This method is useful for showing the ways in which existing regimes which share features with a particular regime type fall short of meeting the requirements of justice as fairness.

## **2. Arguments against laissez-faire capitalism and state socialism**

Rawls's description of laissez-faire capitalism closely matches that of a set of institutional arrangements he discusses in *A Theory of Justice* and calls "the system of natural liberty" (Rawls 1999: 66-67). The system of natural liberty described by Rawls protects a few of the same liberties that are required by the first principle, for example the right to freedom of thought and association and affords full protection to the rights required for a free market to operate efficiently. In *A Restatement* Rawls stipulates that the only constraint on economic efficiency is the requirement to provide a (low) social minimum (Rawls 2001: 72). Careers are to be open to talents and formal equality is protected, but there are no institutions in place to bring about fair equality of opportunity or to secure the fair value of the political liberties. The fundamental principle that animates laissez-faire capitalism is efficiency. The role of the state is to protect formal equality and to bring about maximum economic efficiency. There is no requirement on the part of the state to further influence the distribution of income, wealth or social status. Provided there is formal equality and no participant in the economy has sufficient power to bring about an inefficient distribution (for example, by possessing a monopoly), the distribution that arises, whatever it may be, is just. In many respects laissez-faire capitalism is similar to the libertarian state advocated by Nozick, save that Rawls's version calls for a social minimum to be provided and requires the state to promote economic efficiency (Freeman 2013: 12).

Rawls gives three reasons for rejecting laissez-faire capitalism. First, it does not provide fair equality of opportunity. Distributive shares due to each citizen are greatly influenced by factors that are arbitrary from a moral point of view (Rawls 1999: 72). Second, the state might recognise the political liberties required by the first principle, yet do nothing to protect their fair value. There are no limits on campaign contributions and the influence of money in politics is pervasive. Lastly, the principle of efficiency, rather than reciprocity, regulates social cooperation (Rawls 2001: 137).



The other regime type that Rawls rejects out of hand is what he calls state socialism with a command economy. He assumes that this is a state under the control of a single political party that does not recognise the political liberties of the first principle. This party is assumed to direct a command economy that is not dependent on market prices or even democratic input in order to determine which goods should be produced (ibid.138). Rawls rejects this regime type on the basis that it clearly violates the first principle and because it does not recognise the right of individuals to choose their occupation or their place of work (ibid. 139).

The one regime type that Rawls does not spend much time discussing, is market socialism. Rawls argues that it is possible that this regime type could meet the requirements of justice as fairness, but avoids discussing its institutions in any detail. Rawls argues that when we decide on the institutions of the basic structure, we need to look not only at whether they are just, but also whether they fit with the society's "historical circumstances, to its traditions of political thought and practice, and to much else" (Rawls 2001: 139). For the moment I will defer further consideration of the topic, but will return to it in the next chapter.

### **3. The arguments against welfare-state capitalism**

Writing in *Justice as Fairness: A Restatement*, Rawls (2001: 139) admits that one of the major faults of *A Theory of Justice* was that it "failed to emphasize" the difference between WSC and POD. Part of the motivation behind writing *A Restatement* was to make this distinction clear and remove any doubt about his aversion to WSC. He explains the distinction as follows:

Welfare-state capitalism ... rejects the fair value of the political liberties, and while it has some concern for equality of opportunity, the policies necessary to achieve that are not followed. It permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands. And although, as the name 'welfare-state capitalism' suggests, welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to regulate economic and social inequalities is not recognised. (Rawls 2001: 139)

Rawls's criticisms against WSC given in *A Restatement* amount to four main claims, each of which is meant to show independently that this regime type falls short of the requirements of



justice as fairness. I will argue that at least two of these criticisms do not provide sufficient grounds for rejecting WSC, but that a combination of the remaining two reasons do. Briefly stated, the four considerations that lead Rawls to reject WSC are:

1. A capitalist welfare-state is incapable of protecting the fair value of political liberties.
2. A capitalist welfare-state is incapable of providing fair equality of opportunity.
3. Social cooperation in a capitalist welfare-state is not based on the principle of reciprocity.
4. A capitalist welfare-state is not stable.

Taken together, these four reasons provide grounds for concluding that WSC cannot meet the requirements of justice as fairness. To better understand Rawls's argument against welfare-state capitalism, let us now work through each of the arguments separately and then consider a few responses to them.

### *3.1 WSC does not protect the fair value of the political liberties*

Rawls's first line of attack against WSC is that it does not protect the fair value of political liberties. To support his argument he links the control of economic resources with access to political power. He relies on his ideal description of the welfare-state, in which "a small class is [permitted] to have a near monopoly on the means of production" (Rawls 2001: 139) to argue that this concentration of economic power undermines the fair value of political values. Rawls admits that it is possible for a capitalist welfare-state to include a bill of rights that formally protects the basic liberties, but that this is not enough to secure their fair value. What he means by fair value, is that the playing field should be level when it comes to the political process. Similarly motivated and talented people should have roughly the same chance to shape the outcome of elections, irrespective of their wealth. Rawls thinks that the many ways in which inequalities of income, wealth and social class can be used to influence the political process means that the fair value of the political liberties cannot be protected. For example, the wealthy can pay for think tanks to articulate and defend positions that are to their benefit. The wealthy are also in a much better position to influence the legislature through professional lobbyists or by funding the election campaigns of politicians (O'Neill, 2012: 53).

Rawls appears to be arguing that because capitalist welfare-states allow for a high level of inequality, they are unable to deal with the influence of money in politics. He is adamant that if a small group is allowed to dominate the economy, it necessarily implies that they will come to dominate politics as well (Rawls 2001: 139). In fact, this is one of the main reasons why

Rawls argues in favour of POD: its institutions work to disperse the ownership of capital more broadly (though not equally).

There can be no doubt that wealth can often be converted into political currency, but it would appear that Rawls is moving much too quickly when making his case against WSC in this regard. He seems to hold the view that large disparities in wealth between individuals automatically leads to the fair value of political liberties being undermined and rejects, without ever considering them, means which could protect the fair value of political liberties in a capitalist welfare-state, even in societies that are highly unequal. However, there are a number of strategies that could be employed to insulate the political sphere from undue influence, none of which relies on an egalitarian distribution of wealth. These range from campaign finance laws, to publicly funded election campaigns and ethics committees that review the financial transactions of those in politics (O'Neill 2012: 55). In fact, one could argue that, on its own, an egalitarian distribution of wealth would not necessarily lead to the protection of the fair values of the political liberties.

It appears that Rawls's first complaint against WSC falls short of providing adequate reasons for rejecting the regime outright. If anything, it alerts us to the difficulty of protecting the fair value of political liberties in any regime type. In order for the fair value of these liberties to be realised, those individuals who are equally endowed and that have a similar level of motivation must have an approximately equal chance of winning political office or influencing the outcome of an election. One might even try to argue that *no* system that allows the private ownership of the means of production can meet this requirement. Jackson (2012: 48) makes this kind of claim when he argues that "if the aim is to prevent a small class from controlling both the means of production and democratic political life, then it is necessary to exercise collective democratic control over the economy and not just diffuse individual ownership more widely." My view is that this argument does not hold up to scrutiny. It seems likely that certain regime types will be better able to protect the fair value of the political liberties than others. Much depends on the actual circumstance of politics. It is conceivable that policies could be put in place to make sure that WSC protects the fair values of the political liberties. These could include campaign finance laws which promote transparency and the public financing of elections.

### *3.2 WSC does not meet the requirements of fair equality of opportunity*

Rawls's second criticism against the capitalist welfare-state is that it is incapable of fully instituting fair equality of opportunity. Rawls admits that the welfare-state may go some way toward satisfying the demands of fair equality of opportunity (FEO), but claims that "the policies necessary to achieve that are not followed" (Rawls 2001: 136). The demands for fair equality of opportunity are rigorous; they require that "those who have the same talent and ability and the same willingness to use these gifts should have the same prospect of success regardless of their social class of origin" (ibid. 44). Rawls seems to be saying (although he does not spell it out) that the concentrations of wealth permitted by WSC will make it impossible for the requirement of fair equality of opportunity to be met because the wealthy will always be able to outspend the least-advantaged when it comes to developing human capital. In other words, the inequalities permitted by WSC will prevent the attainment of fair equality of opportunity even when there is considerable spending on education by the state.

Freeman provides two arguments to demonstrate that the capitalist welfare-state is structurally incapable of meeting the requirements of fair equality of opportunity (Freeman 2013: 28). In the first place, Freeman claims that the capitalist welfare-state can meet the requirements of the FEO if we understand its purpose to be to "educate individuals so that they maximise the development of their productive capacities" (Freeman 2013: 29). Under this narrow interpretation of FEO, the aim of educational opportunities is only to prepare individuals to compete for positions in a free market economy. To understand what this means we might think of all educational institutions being under the control of the state with strict policies in place to ensure that differences in social class do not lead to differences in educational attainment. Understood in this narrow sense, it is conceivable that a capitalist welfare-state could meet this requirement. However, this is clearly not the view of FEO that Rawls holds. He argues that "resources for education are not to be allotted solely or necessarily mainly according to their return as estimated in productive trained abilities, but also according to their worth in enriching the personal and social life of citizens, including the less favoured" (Rawls 1999: 107). The question is now whether WSC Rawls's understanding of FEO.

Freeman's view is that it is impossible for a capitalist welfare-state to meet the requirements of Rawls's understanding of FEO, which requires education to enrich the personal lives of students. He argues that "the guiding aims and principle of WSC do not seek to limit inequalities in the primary social goods – income, wealth, social and economic powers – to guarantee fair equality of opportunity" (Freeman 2013: 30). This argument that WSC can never

fully meet the requirement of FEO mirrors Rawls's argument that WSC can only provide formal protection of the political liberties, but cannot guarantee their fair value. Freeman is saying that the inequalities permitted by WSC precludes it from meeting the requirement of fair equality of opportunity.

However, this argument is not altogether convincing. Firstly, it is not at all clear why the potential inequalities in income and wealth that are permitted by welfare-state capitalism should automatically make it impossible for FEO to be instituted. Even if the principle of restricted utility does play a major role in determining distributive shares in welfare-state capitalism, it does not follow that resources for education would have to be distributed solely on the basis of their perceived economic return. It may well be that such a state adopts something of a mixed system that is sensitive both to the demand for certain types of labour and to the demand for particular forms of education that enrich the personal lives of individuals in the society and contribute to their sense of self-worth. Thus, the worry about FEO does not provide sufficient grounds for rejecting WSC. Furthermore, if a capitalist welfare-state had the policies in place to make the intergenerational transfer of advantage impossible, for example through estate taxes and heavy spending on the development of human capital, it is difficult to see how there could be cause for anyone to complain that they were being treated unfairly in terms of FEO.

Freeman's second argument against WSC is based on an amendment to FEO that Freeman makes. He argues that the economic agency of the individual is itself something which must be subject to FEO. In other words, not only must similarly talented and motivated individuals have roughly the same chance to achieve similar positions in society, it also requires that everyone has ongoing opportunities to exercise their economic agency. This view departs from Rawls in a significant way by enormously broadening the range of 'opportunities' that FEO should be applied to. Freeman makes clear what this demands when he states:

The suggestion then is that the principle of fair equality of opportunity requires not simply (as Rawls says) fair opportunities to compete for open positions and ongoing opportunities to take advantage of educational and cultural resources; FEO also requires ongoing opportunities for citizens to exercise economic powers and some degree of freedom and control in their work, thereby assuming a degree of initiative and responsibility. (Freeman 2013: 32)

Freeman calls this broader interpretation of FEO a “friendly amendment” to Rawls’s view. He justifies it on the grounds that the chance for “less skilled workers to be able to exercise developed capacities not just in their leisure time but in their workplace as well ... can play a crucial role in providing social bases of self-respect for free and equal citizens” (ibid. 33). This goes further than what Rawls appears to have meant with FEO in either *A Restatement* or *A Theory of Justice*. In discussing the meaning of FEO Rawls says that it is “a difficult and not altogether clear idea; its role is perhaps best gathered from why it is introduced: namely to correct the defects of formal equality of opportunity” (Rawls 2001: 43). This appears to be at odds with what Freeman tries to do when he broadens the understanding of FEO. He no longer uses it as a corrective for formal equality, but instead stretches it in an attempt to overcome what he perceives as a defect in Rawls’s workings of the principles of justice as fairness, namely that they seem to permit large inequalities of income and wealth.

In my view, Freeman’s broader definition of FEO is unjustified and does not stand up to scrutiny. FEO requires that the prospects of individuals of similar talent and motivation should not be affected by the social class of their origin, but this does not mean that they need to have the ongoing opportunity to have control over productive capital (O’Neill 2012: 57). Freeman’s broad interpretation of FEO could include things like giving all workers within a firm the right to vote for the management and to take part in the setting of policies (Freeman 2013: 33). This amounts to a form of socialism because the requirement that economic power be shared on an on-going basis alters the concept of private property beyond recognition. If the workers in the firm have significant rights to affect the direction the firm is taking or even decide on the management, then private property begins to lose its meaning. I intend to show in the following chapter that the right to private property goes hand-in-hand with the right to alienate it. What Freeman proposes with his version of FEO effectively removes the right of the owners of property to alienate it and in doing so removes one of the cornerstones of POD.

There is a final argument that could be made with regard to FEO and the capitalist welfare-state: one could argue that the high level of inequality permitted by the welfare-state would allow parents in the most advantaged class to circumvent the policies that promote FEO. They would do this either by purchasing additional education for their children above and beyond what is provided by the state, or they would simply be able to give more attention to their children’s schooling themselves because they have the wealth necessary to buy time to spend with their children. Any attempt to counteract the effect of an individual’s effort to increase the level of opportunity available would require drastic intervention by the state. Rawls considers

the workings of the family to be outside the scope of a theory of justice and, in any event, he does not consider it be at odds with fair equality of opportunity. He argues that “the internal life and culture of the family, influence, perhaps as much as anything else, a child’s motivation and his capacity to gain from education, and so in turn his life prospects, these effects are not necessarily inconsistent with fair equality of opportunity” (Rawls 1999: 301). In fact, Rawls goes so far as to say that “the difference principle and the priority rules it suggests, reduces the urgency to achieve perfect equality of opportunity” (Rawls 1999: 301). He concludes that there are practical limits to FEO. It appears that these limits would apply to any regime type (not just welfare-state capitalism); hence it does not make sense to reject WSC on the basis that it would suffer from these same limits.

In light of the above, we can conclude that the claim that welfare-state capitalism must be rejected because it does not meet the requirements of fair equality of opportunity, and hence of justice as fairness, fails. I now turn to two arguments against WSC based on the idea that it cannot fully satisfy the requirements of the difference principle.

### *3.3 WSC does not meet the requirement of reciprocity*

The third criticism against WSC is that social cooperation in this regime type is not based on the idea of reciprocity. Social cooperation is different from coordinated activity in that it is “guided by publicly recognised rules and procedures which those cooperating accept as appropriate to regulate their conduct” (Rawls 2001: 6). This concept of social cooperation contains within it the notion of fairness and reciprocity, in that it is only reasonable to cooperate on terms that everyone can find acceptable. This does not mean that the benefits of cooperation must be equally distributed, only that no one can expect others to accept terms that they would not be willing to accept if their positions were reversed.

Rawls argues that the capitalist welfare-state fails to meet the requirement of reciprocity because it does not comply with the difference principle. In Rawls’s characterisation of WSC, the benefits of cooperation are distributed according to the principle of restricted utility. In this version of utilitarianism there is an obligation to ensure that no one falls beneath a minimum threshold. Once no one is below this threshold, distribution is to take place in a manner that maximises total utility. Put more simply, it requires that everyone be provided with a social minimum; once this minimum has been reached, economic cooperation takes place on the basis of producing the highest possible total welfare. This means that it is legitimate for the most

advantaged group in society to make gains at the expense of the least-advantaged, provided that no one falls below the social minimum.

From the perspective of the least-advantaged in a capitalist welfare-state, it would appear that the state treats them as victims of misfortune rather than as free and equal citizens. The fact that they do not have the opportunity to take part in society's cooperative ventures simply because it is inefficient for them to do so, does grave damage to their self-esteem (Rawls 2001: 139). This characterisation of the least-advantaged group as beneficiaries of charity further encourages members of this group to take a negative view of themselves and leads to inequalities in social standing that go against the idea of free and equal citizens exercising the two moral powers. The danger of this, according to Rawls is that "there may develop a discouraged and depressed underclass many of whose members are chronically dependent on welfare" (ibid. 140). The alienation felt by this group leads them to withdraw from the political process, which further reduces their ability to exercise and develop the two moral powers.

### *3.4 WSC does not meet the requirement of stability*

The previous criticism brings us to the final challenge to WSC. The last argument is that the capitalist welfare-state cannot guarantee stability. What Rawls means by this is that the principles that underlie WSC do not appeal to a sense of justice of citizens. A just system, says Rawls "must generate its own support. This means that it must be arranged so as to bring about in its members the corresponding sense of justice and the effective desire to act in accordance with its rules for reasons of justice" (Rawls 1999: 261). He does not think that a capitalist welfare-state can be arranged in such a manner that it generates its own support. Beings who are free and equal and driven by the two moral powers would not be able to accept the terms of social cooperation imposed by the capitalist welfare-state, meaning that they would not be willing to support the institutions of the basic structure. This type of state does not make use of the difference principle to structure the permissible inequalities. Instead, it makes use of restricted utility, in which everyone is guaranteed some minimum below which they cannot fall, but all equalities above this point are determined by maximising utility, or something similar, such as maximising average utility. Rawls argues that citizens who conceive of themselves as free and equal could not accept these terms.

The argument here is not that individuals behind the veil of ignorance would reject the principle of restricted utility (they would not select it, but that is not what is at stake here), but rather, that the requirements of this principle place unreasonable demands on the citizens of a



democratic society (Freeman 2013: 24). The principle of restricted utility does not deal with morally arbitrary distributions of talent or luck in a way that calls forth the willing cooperation of all the members of society. These advantages are not dealt with in a way that brings about the maximum possible gain for the least-advantaged; in fact, they may be dealt with in ways that bring about no advantage to anyone except those who are already well off. It may even be the case that the least-advantaged are asked to accept a lower level of social and economic advantages in order that the most advantaged may have even more. This is possible because, once the social minimum has been satisfied, there is no further requirement that the least-advantaged gain any benefit from social cooperation. One can conceive of a society in which the most advantaged group pays the taxes required to secure the social minimum for everyone but does not engage with those at the level of the social minimum in any other way. In this situation, the wealthy are effectively paying off the poor to stop them from demanding reforms that would establish terms of social cooperation that are more egalitarian.

In the realm of practical politics, there may also be considerable disagreement as to what should constitute the social minimum. This would be a source of constant conflict between the least-advantaged and the rest of society. Those who are the least-advantaged would constantly strive for an increase in the social minimum, while those who are well-off would fight to reduce it. Politics is then reduced to a zero-sum game in which one side must lose in order for the other to gain. How to divide the total value of everything that has been produced becomes the question that animates politics, rather than trying to determine the terms of cooperation most appropriate for society. This conflict would be a constant source of instability. Because the source of the instability is the principle which animates the system itself, adjustments to the level of the social minimum can only ever temporarily relieve tension, not definitively deal with it.

Like the argument that WSC does not fulfil the requirement of reciprocity, the criticism that this regime type cannot ensure stability is difficult to refute. We have seen, however, that the first two lines of attack against welfare-state capitalism fail. There are no convincing reasons why this regime should not, in theory, be able to protect the fair value of political liberties or institute policies to bring about FEO. The only reason for rejecting it in favour of some other set of institutional arrangements is the fact that it does not recognise the principle of reciprocity (at least not the extent required by the difference principle). It turns out then, that the case against WSC is not as simple as Rawls would have us believe. Nonetheless, the arguments against WSC which are based on the idea that it does not recognise the principle of reciprocity



do seem convincing. We are now in a better position to evaluate Rawls's preferred alternative to WSC in more detail.

#### 4. The institutions of property-owning democracy

The concept of a POD is fleetingly referred to in *A Theory of Justice*. It is mentioned only twice in the original text. There is no explanation as to what the term entails and there is only a short footnote to indicate that Rawls drew inspiration from the work of James Meade. It is understandable that early readers of *A Theory of Justice* assumed that Rawls was in favour of some kind of welfare-state. However, with the publication of *A Restatement*, Rawls makes it clear that he does not think that the welfare-state could meet the requirements of justice as fairness. His preferred alternative is POD, which he describes as follows:

In property-owning democracy ... the aim is to realise in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal. To do this, those institutions must, from the outset, be put in the hands of citizens generally, and not only a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these means is human as well as real capital, that is, knowledge and an understanding of institutions, educated abilities, and trained skills. Only in this way can the basic structure realise pure background procedural justice from one generation to the next. (Rawls 2001: 140)

In the paragraph above we can discern several complementary ideas. These ideas, once brought to life through a collection of institutions, constitute property-owning democracy. To begin with we take a broad view of the central idea behind POD, after which we will examine more closely the specific institutions associated with this regime.

##### 4.1 The aims of POD

The most prominent idea associated with POD is that mechanisms must be in place to ensure that the ownership of wealth and capital are relatively widely held over time. This is not to be maintained by means of progressive taxation that transfer wealth to the least-advantaged by means of welfare payments, but rather by “ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each period, all this against a background of fair equality of opportunity” (Rawls 2001: 139). What Rawls means by this is that ‘redistribution’ takes place *ex ante*, rather than *ex post*. This difference

between these two types of redistribution is that *ex post* redistributes goods in order to reduce the inequality, while *ex ante* ‘predistribution’ aims to create a more level playing field by giving everyone the means to engage in social cooperation on a more equal basis. The difference between redistribution and predistribution will be discussed in more detail in the following chapter.

Part of Rawls’s interest in predistribution is because he argues that the institutions that govern background justice must be structured in such a way as to put citizens in a position “to manage their affairs on a footing of a suitable degree of social and economic equality” (Rawls 2001: 139). What Rawls seems to mean by this is that each person should have access to sufficient productive capital so as not to be forced into subservient relationships in order to earn their living. Meade thought that one of the great virtues of property-owning democracy was that it could secure the independence of the individual both from the state and from fellow citizens (Meade 1963: 38-39). POD also appeals to Rawls in so far as it promotes liberty and autonomy. Having access to capital means that the individuals have greater freedom to decide on the kind of employment that they are willing to accept. They can live off their capital and do not face the pressure of having to work just to survive (at least in the short-term).

The idea that each individual must have a share of capital is easier to understand when it is contrasted with the way that the institutions of a capitalist welfare-state deal with redistribution. A capitalist welfare-state reduces inequality by using progressive taxation to redistribute income from the more advantaged to the least advantaged. The reasoning behind this redistributive scheme is that the high levels of inequality are a consequence of markets efficiently responding to supply and demand, and that the downward redistribution is an incentive for the least advantaged to accept the prevailing level of inequality. Rawls argues that this is one of the major shortcomings of WSC. It does not recognise the principle of reciprocity in social cooperation and treats the least advantaged as “objects of our charity and compassion” (Rawls 2001: 139). In a POD, the institutions of society are structured in such a way that all citizens can take part on a relatively equal footing. This is made possible by giving each citizen sufficient productive means to enable them to interact with one another on the basis of equality.

Returning to the criticisms against WSC made in the previous section, it becomes clear why POD is regarded as being better able to realise the requirements of justice as fairness. It does so because the wide dispersion of capital (both human and physical) allows for social cooperation to take place on the basis of reciprocity, which promotes the self-respect of all

citizens, including the least-advantaged. The idea is that when these two regime types are compared, the least advantaged will have access to a greater share of primary social goods (which include income, wealth and the social bases of self-respect) in a POD than they would have in a capitalist welfare-state.

The final aim of POD that I will discuss deals with the issue of distributive justice. One of the significant differences between POD and WSC is how this problem is approached. In Rawls's description of WSC, the question of distributive justice is dealt with by means of a utilitarian calculus. The particular policies of the state and the organisation of the institutions aim to satisfy to the greatest extent possible the existing desires of the citizens (Rawls 1999: 77). Decisions about the distributive share that should go to each citizen (once the social minimum has been established) are made by attempting to calculate which course of action will bring about the greatest possible level of preference satisfaction. In contrast, POD has no particular set of preferences that it seeks to satisfy. Once a just basic structure is in place, the distributive share that goes to each person is a matter of pure procedural justice. In other words, once the basic structure is just, the distribution that arises from it is necessarily also just. In Chapter 4 I will revisit this issue and show that Rawls was mistaken to think that the notion of pure procedural justice can be relied on to settle distributive shares. For the moment, I set aside this issue in order to concentrate on the institutions that constitute a POD.

#### *4.2 The characteristics of a POD*

To visualise what a POD might look like, it is useful to once again discuss the veil of ignorance. Rawls uses this device to show how and why the two principles would be selected, and to give an idea as to how the two principles are operationalised through the institutions that govern the basic structure of society. To do this, Rawls invites us to imagine the veil of ignorance being gradually lifted in a process that involves four stages (Rawls 2001: 49). During the first stage, the veil has not yet been lifted and the participants remain in virtually complete ignorance of their circumstances. It is at this stage that the principles of justice as fairness are adopted. At the next stage, described as the 'constitutional convention', the principle of liberty is formalised as a bill of rights or similar document. Next comes the 'legislative stage,' when the veil is lifted so as to make the individuals aware of the general conditions of their society, but they remain ignorant of their own position. At this stage, they enact legislation "as the constitution allows and the principles of justice require and permit" (Rawls 2001: 48). At the final stage, the veil is lifted completely and everyone has complete knowledge of their position and the facts of their society. Rawls argues that it is a relatively simple matter to determine whether the

requirements of the first principle have been met: one can check whether or not the constitution lists the liberties required by the first principle and one can determine to what extent the political institutions function to protect these liberties. It is, however, far more difficult to determine the extent to which the requirements of the second principle have been met. For example, there may be reasonable grounds for agreeing or disagreeing about whether or not a certain policy will bring about outcomes that satisfy the difference principle.

The legislative stage is of particular interest to proponents of POD because it is at this stage that the contracting parties must agree on the set of institutions that will make up the basic structure of their society. At this stage, the individuals behind the veil of ignorance know the facts and the historical situation of their society, but they are not yet aware of the specific place in society that they will occupy. These ‘ideal’ legislators must take these factors into account when deciding on the institutions that are to govern it (ibid. 139). It is at this stage that they need to decide on particular institutions, for example whether property should be owned collectively, or not.

Rawls does not provide a list of specific institutions that are necessary for constituting a POD, but he does make suggestions throughout *A Restatement* about what might be required. Williamson and O’Neill argue that, at the very least, POD will require institutions that can deliver the following three outcomes:

1. Capital must be widely (though not necessarily equally) distributed among citizens. This includes both human capital and productive capital. Citizens must have real power over how this capital is employed.
2. Policies must be in place to prevent the formation of an economic elite that could transfer its advantages across generations.
3. Campaign-finance regulations must be in place to protect the fair value of the political liberties. (Williamson and O’Neill, 2009: 5)

These three outcomes are attained through a collection of policies and institutions which work together. The aim of this collection of policies and institutions is to bring about a just basic structure. Once this just basic structure is in place, distributive justice will be dealt with by pure procedural justice.

Freeman (2007: 226-231) has identified a number of institutions and policies in Rawls’s work that have a bearing on POD, but Rawls never discusses these in a systematic way. To get a clearer picture of POD, it is useful to look at some of the institutions discussed by Freeman in

order to understand how they work together to meet the requirements of justice as fairness. The issues he discusses are:

1. Taxation.
2. Health and education.
3. Work and welfare.
4. Property, ownership and markets.

In the following paragraphs I briefly discuss each of these aspects of POD, using Freeman's categories, but drawing on Rawls and other proponents of POD to provide a clearer picture of what this regime type might look like.

### *Taxation*

Among the most important mechanisms whereby the relatively equal distribution of capital in a POD is maintained is by means of inheritance taxes. Taxation serves a dual purpose: it is both a means for the state to collect revenue and prevent excessive accumulations of wealth. In order to achieve these dual goals, Rawls proposes a form of estate tax that is levied not on the value of the estate itself, but on those who are beneficiaries of the estate (Rawls 2001: 161). This takes the form of a progressive tax, with the heavier burden falling on those who receive larger bequests and who already possess substantial wealth. The aim of this tax "corresponds to a social ideal in which there is no permanent class of politically privileged holders of wealth and capital sufficiently powerful to extract gains for itself that do not function to benefit the least well off" (Williamson and O'Neill, 2009: 3). Inheritance tax thus serves as a kind of anti-corruption measure meant to prevent the formation of an entrenched rent-seeking class.

Rawls also argues in favour of a consumption tax, rather than income tax, the idea being to tax people "according to how much they use of the goods and services produced and not according to how much they contribute" (Rawls 2001: 161). In effect this would be a type of ad valorem tax similar to VAT in South Africa. The usual charge against this form of taxation is that it is regressive, but Rawls thinks that this can be ameliorated by introducing exemptions that make it consistent with the requirements of the difference principle.

### *Health and education*

To maintain FEO, Rawls considers it necessary that both universal healthcare and education be provided by the state (Rawls 2001: 176). The level of healthcare provided by the state is decided at the legislative stage and depends on conditions prevalent in society (for example,

the rates at which various diseases occur, etc.). The aim of state-funded medical care is to ensure that citizens who suffer some accident or illness have access to the care they need in order to return to their role as citizens who are able to engage in social cooperation.

The state is required to provide the resources necessary for education, but this does not mean that it must itself be responsible for education. Rawls considered it viable that a private education system based on a system of vouchers that affords every person an approximately equal share of these resources would be acceptable (Freeman 2007: 90). The exact requirements for an education system in a society that strives to meet the requirements of justice as fairness are not altogether clear. Obviously, it must meet the requirements of FEO, but it is difficult to say to what extent this is possible or even whether it is possible to ascertain with any degree of certainty whether the requirement of FEO has been met. A further problem is that education must also provide the opportunity for citizens to learn things, or participate in activities that are not strictly related to market-related activities. It is also meant to provide them with a means to establish their self-worth. How this is meant to work in practice is not made clear by Rawls. At this point, all we can say is that some kind of basic education must be available to everyone who desires it.

### *Work and welfare*

Rawls considers that everyone should be willing to work “and to do their part in sharing the burdens of social life” (Rawls 2001: 179), provided that the terms of cooperation are fair. Those who choose not to work are not owed anything beyond the social minimum. The social minimum is what is needed to guarantee that “at least the basic needs to a decent life, and presumably more” are met (ibid. 130). Rawls does not go into the specifics of what such a social minimum would entail. He certainly does not advocate that individuals should receive welfare payments irrespective of whether or not they are employed. Individuals are responsible for their conceptions of the good (and are thought to be capable of revising them); therefore it is unreasonable to ask of others to bear the cost of supporting a particular conception of the good without engaging in some kind of exchange with them.

When Rawls says that “the social minimum, whatever it may provide beyond essential human needs, must derive from an idea of reciprocity appropriate to political society so conceived” (Rawls 2001: 130), he seems to imply that the state must provide the essentials needed for living a life of dignity, irrespective of whether one does or does not work. There is some support for this interpretation based on Rawls’s remarks on leisure time. Rawls says that it is possible

that leisure time could be included in the index of primary goods. If this were done, the minimum received by those who choose not to work should be equal to the minimum received by those who earn the least, minus the wages received by those who earn the least. Freeman (2007: 230) argues that this is what Rawls intended when considering the possibility that leisure time might be included in the index of primary goods. Freeman explains that, despite not working, everyone is owed something from the state because they contribute to society by performing their civic duties such as serving on juries, voting and performing national service. This is not an altogether convincing argument, and I will return to it in the following chapter.

### *Property, ownership and markets*

The central idea of POD is that productive capital is held widely and relatively equally, but privately, by citizens<sup>7</sup>. The kind of property that Rawls appears to have in mind is physical capital, such as machinery used in the production of goods, or the land that factories are built on, or natural resources. This type of property is distinct from personal property, which is guaranteed by the first principle (Rawls 2001: 114).

What exactly Rawls means by private ownership is never spelt out in any detail, but his endorsement of relatively free markets and the use of prices to determine resource allocation indicates that he believes that the right to own private property includes the right to alienate it. In the next chapter I will take a closer look at the status of private property and how markets might be regulated in a POD.

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<sup>7</sup> Rawls's views on this issue were shaped by those of James Meade, who we have already discussed, and also by an article by Krouse & McPherson entitled "A 'Mixed'-Property Regime: Equality and Liberty in a Market Economy" which appeared in 1986. This article served to further his thinking about how liberty and equality could be reconciled within a market economy.

## Conclusion

In this chapter, I showed how Rawls uses ideal regime types to reflect on the institutions of a just society. I questioned the use of this method, especially with regards to types of regime (like POD) that are not abstractions of existing regime types. However, for the purposes of this chapter, I accepted this approach and tried to make sense of Rawls's arguments against WSC and in favour of POD within the confines of the methodology he employs. I found that at least two of his arguments against WSC can be set side aside as not being definitive.

The first of these arguments is that WSC cannot protect the fair value of the political liberties because of the corrupting influence that large concentrations of wealth have on politics. This argument was rejected because it can be shown that there are reasonable measures that could be put in place that would allow a capitalist welfare-state to protect the fair value of the political liberties. The second argument against WSC is that it is unable to guarantee FEO. This argument was rejected on the basis that there are measures that could be put in place to allow those with similar talent and motivation to achieve similar outcomes. The two arguments that do show that a capitalist welfare-state is not compatible with justice as fairness are that (i) WSC does not recognise reciprocity as the basis of cooperation and (ii) that it is unlikely to be able to generate the support necessary to maintain its stability.

I ended this chapter with a brief description of the institutions associated with POD. This description forms the foundation of the following chapter in which I subject POD to a series of criticisms that aim to show that it too, like WSC, is not compatible with justice as fairness.



## Chapter 3: Property-owning democracy and private property

### Introduction

In this chapter, I aim to demonstrate two things: first, that there is little hope that the private ownership of the means of production and natural resources can be squared with the requirements for POD, and second, that it is a mistake to try to understand the requirements of justice in light of ideal regime types.

With regard to the first point, I evaluate arguments by Freeman (2012) and Williamson (2009) and show that the aims of POD are unlikely to be met in a system that also recognises private property. I show, further, that the distinction between *ex ante* ‘predistribution’ and *ex post* redistribution, which is one of the central features of POD, does not make sense. This distinction relies on the idea that economic activity can be divided into discrete, quantifiable, periods. I show that this assumption does not stand up to scrutiny and must be rejected. Lastly, I demonstrate that there is far more limited support for the strongly egalitarian features of POD in justice as fairness than is commonly thought.

As far as the second, and more important, point is concerned, I show that appealing to ideal regime types to think about justice does not offer any help in thinking about what justice as fairness requires in terms of actual institutional design. Showing that ideal regime types are of no use for theorising about the institutions of a just basic structure puts us in a position to explore an alternative approach to institutional design in the following chapter.

### 1. Private, personal and collective property

Any argument about property rights within justice as fairness must begin with a definition of the term ‘private property’. The way that Rawls uses the term suggests that he means the ownership of productive capital. In Rawls’s discussion of competing regime types, he argues that justice as fairness is neutral between POD and market socialism. POD permits “the right to private property in natural resources and the means of production generally, including rights of acquisition and bequest” (Rawls 2001: 114). In market socialism the right to property is understood as the “equal right to participate in and control the means of production and of natural resources, both of which are to be socially, not privately, owned” (ibid. 114). This distinction between the two regime types is broad, but clear. In the former, individuals own

capital in their capacity as private citizens, while in the latter they hold capital in some form of collective scheme.

To avoid confusion about what Rawls means when he differentiates between private and collective ownership it should be noted that he thinks that every citizen has the right to own what he calls ‘personal’ property. Freeman explains that this is the right “to use and control the possessions needed to effectively exercise the basic liberties and freely pursue a wide range of permissible conceptions of the good” (Freeman 2007: 50). In *A Restatement* Rawls avoids providing any substantive definition of personal property, stating only that “it would seem to include at least certain forms of real property, such as dwellings and private grounds” (Rawls 2001: 114). He does not say that such property must provide the means for individuals to pursue a particular conception of the good. The main purpose of personal property is to provide “sufficient basis for personal independence and a sense of self-respect” (Rawls 2001: 114). The right to personal property is a basic right for Rawls and it therefore falls outside the discussion about the merits of various property rights systems.

As we have already noted, Rawls argues that the choice of a property rights regime depends on a society’s “historical circumstances, its traditions of political thought and practice, and much else” (Rawls 2001: 139). Rawls makes it clear that deciding on the property rights regime will be determined by a host of factors, only some of which are related to justice as fairness. Writing about the difference between collective property and private property, he cautions that the decision about which of the two better meets the requirements of justice as fairness is a difficult one:

Which of these systems and the many intermediate forms most fully answers to the requirements of justice cannot, I think, be determined in advance. There is presumably no general answer to this question, since it depends in large part upon the traditions, institutions and social forces of each country, and its particular historical circumstances. The theory of justice does not include these matters. (Rawls 1999: 271)

The idea here is that the conception of justice embodied by Rawls’s two principles could be realised within different systems of property rights. Justice as fairness is presented as being compatible with social ownership or with a system of private property or some mix between the two. This is an assumption that requires further investigation. However, before delving into

arguments about the status of property rights and their compatibility with justice as fairness, it makes sense to get a better understanding of Rawls's views on property.

Rawls views the existence of the institution of private property in much the same light as did Rousseau. The institution is not a feature of the world, but rather a social construct, created "by virtue of a background of social rules which are collectively accepted and generally recognised as authoritative by (most) members of society, and by virtue of people interacting according to these rules" (Freeman 2011: 39). The institution of private property specifies the kinds of things that can be considered to constitute property and lays down rules specifying how such things can be used and transferred. The institution is linked to other sets of rules and regulations that contribute to the way private property is understood. For example, the institution of private property is intimately linked to the system of taxation. Taxation is a social construct in the same way that property is and it has a bearing on what constitutes the fair use of property. Taxes are modifications of property rights that affect how property can be used and transferred (Murphy and Nagel 2005: 37). There are many other policies and regulations that affect how property can be used, transferred and acquired, such as environmental regulation or the law of contract. The possible modifications and restrictions on how property can be used makes it difficult to distinguish between the concept of private property and that of collective property. In order to gain clarity on the issue, I make use of the distinctions drawn by Waldron (1985) and Alchian (2008).

Waldron approaches the issue of separating private from collective property systems by first defining the concept of property, before considering the different ways in which it can be held. Waldron argues that the way to understand property is to see it as "a matter of rules about access to and control of material resources" (Waldron 1985: 325). In other words, the concept of property is defined by the set of rules or laws that govern how resources may be used. This broad definition allows for the distinction between various types of property regimes to become clear.

Given the above definition, Waldron then defines a private property system as one in which "the rules governing access to and control of material resources are organised around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual" (ibid. 327). This means that the available resources are connected in a special way to individuals. This special connection is denoted by the term 'ownership'. In a system of private property, the rights of owners to do what they like with their property is not

unlimited, but there are at least two features that can be thought of as being essential to private property. The first is that the owner has the exclusive right to the services of the resource (Alchian, 2008). This means that owners can decide what to do with the resource – to make it available to others, to use it themselves, etc. The second essential feature is the right to “delegate, rent or sell any portion of the rights by exchange or gift at whatever price the owner determines” (Alchian, 2008). By contrast, a system of collective ownership requires that decisions about how resources are to be used can only be decided by appealing to the interests of the group as a whole. There is no special connection between individuals and the resource which allows them to decide on their own what it is they wish to do with such resource. In a system of collective property, no individual has the right to decide about the use of property without taking into account the rest of the members of society. This is not to say that there cannot be privileged positions within a system of collective property, whereby certain individuals would have greater decision-making power than others. This kind of power would be within the bounds permitted by a system of collective ownership, as was the case, for instance, with central planners in the USSR or executives in state-owned enterprises in China.

In light of the above, it should be clear that when we speak of something as being privately owned, we mean that no one except the owner has a right to decide how the particular resource or object is to be used. Thus, when Rawls says that POD allows for the private ownership of the means of production, it means that the owners of the means of production have the exclusive right to decide on how they are to be used.

Based on the preceding discussion of the differences between personal, private and collective ownership, we are in a position to discuss the status of private property in a POD. The main point to be made is that if property-owning democracy is to make sense at all, it is necessary that the ‘property’ in POD be understood as having two essential features: (i) individuals must have the right to use such property without consulting others (though within the bounds of law) and; (ii) they must have the right to alienate such property (again within the bounds of the law). This appears to be Rawls’s view as well. He never provides a definition of property, but in his discussion about the ownership of natural resources he includes the right to bequeath it and the right to acquire it from others (Rawls 2001: 114). The implication here is that individuals must have the right to acquire and hold property, make use of it, generate a return from it and to alienate it, all without consulting others. Rawls does not provide a substantive list of the features associated with private property, but it is reasonable to assume that he would accept many of the standard features of a liberal conception of ownership listed by Honoré (1961:

107-147). These include: the right to use and possess property; the right to determine how it is to be used; the right to its capital value; and the right to have the property protected against unjustified claims.

There may be ancillary rules that govern how private property can be acquired legitimately, or that limit how it can be used, but these qualifications do not alter its basic constitutive features. To clarify: consider the status of a factory that produces cars. The owner of the factory owns both the land on which the factory stands as well as all of the buildings and machines that make up the factory. The owner may choose to open the factory and build cars, or she may choose to sell the entire business and the land. If the term ‘private property’ is understood in the sense described above, the decision about whether to produce cars or sell the business is entirely in the hands of the owner. Any course of action that she takes will bring into play additional rules that are associated with the institution of private property. For example, if she were to sell the factory, the state might impose taxes on the transaction. These taxes do not invalidate her right to alienate the private property; they form part of the rules that constitute the institution of private property. The core constitutive features of private property remain in place as long as no ancillary rules fundamentally undermine them. For example, owning property in a neighbourhood that has a strict building code that does not permit three-storey houses does not invalidate the owner’s private property right. The owner still has exclusive use of the property, has the right to alienate the property if she so chooses, and has a wide range of options as to what to do with her property.

It could be argued that, if there are enough of these ancillary rules, the rights associated with private property effectively disappear. Excessive regulation regarding the use of certain kinds of property may undermine the right to its exclusive use. A tax regime might affect the right to alienate property to such an extent that the right loses its value. At this point the right to private ownership in that specific property is lost. The property can no longer be said to be privately held.<sup>8</sup> For the purposes of this chapter, I accept that, when Rawls and other proponents of POD use the term ‘private property’, they mean that the owner of the property has the exclusive right

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<sup>8</sup> Freeman argues that these kinds of regulations could be extensive in a POD and that the private ownership of something might not necessarily include the right to alienate it (Freeman 2007: 50). For example, he argues that the owner of a painting by Picasso does not necessarily have the right to destroy it. In my view Freeman is not justified in making this claim. His argument seems to be that certain artefacts can effectively be nationalised if they have significant cultural value. I think that this would sit uneasily with Rawls’s requirement that the state remain neutral with regard to different conceptions of the good.

to use and alienate it. Without these two rights, private property is no longer ‘private’ and it would not make sense for Rawls to distinguish between POD and liberal socialism.

## 2. Property, equality and POD

Now that we have a relatively clear understanding as to what Rawls means by the term ‘private property’ we can evaluate some of the main arguments in favour of POD. My aim here is simply to show that there is no easy fit between Rawls’s conception of private property and the institutional framework of POD. To this end, I put forward four different arguments. The first argument deals with Freeman’s (2013) attempt to amend FEO to prevent the wide ownership of capital from being narrowed by voluntary transfers. Freeman recognises that a free market and the existence of private property means that there is always a possibility that relatively equal ownership of the means of production could be transformed into an unequal distribution. In his view, the only way of preventing such inequality while maintaining the private ownership of the means of production, is to amend the principle to FEO. I discuss Freeman’s amendment and show that it is, in fact, impossible to guarantee a broad distribution of ownership within a system that allows for private ownership, such as POD.

My second argument deals with Williamson’s (2009) attempt to demonstrate how the United States could be converted from a capitalist welfare-state into a POD. His argument is interesting because he concludes that the only way to maintain the relatively equal distribution of wealth required by POD is to use strategies associated with socialism, such as mandating the collective ownership of large enterprises. I discuss this approach to maintaining a broad ownership of the means of production and argue that there is simply no way for reconciling private ownership and free markets with the broad ownership requirement of POD.

Thirdly, I discuss another central feature of POD: the requirement that income and wealth not be redistributed *ex post* but rather that resources be put into the hands of citizens *ex ante*. I argue that this distinction does not make sense and that proponents of justice as fairness have no basis on which to argue for any kind of distribution which is not based on the notion of reciprocity.

My final argument tries to show that justice as fairness does not provide the necessary basis for strongly egalitarian institutional arrangements. I evaluate three of Rawls’s arguments in favour of equality and find that none of them provides strong reasons for creating institutions that guarantee a strongly egalitarian distribution of economic power.

## 2.1 *Fair equality of opportunity*

In this section I discuss Freeman's argument that FEO requires that policies be put in place to grant workers significant control over the conditions that they labour in. This is a form of control over and above the control that they might have as owners of capital in a POD where the means of production are widely held. He claims that there need to be "ongoing opportunities for citizens to exercise economic power and some degree of freedom and control in their work" (Freeman 2013: 32) and not just the normal rights accorded to workers in a firm, such as the right not to be dismissed unfairly, etc. In other words, the economic powers conferred by POD through the relatively equal distribution of productive capital are not sufficient. Workers within a firm must have economic power to choose management and decide on the policies that will govern the working of the firm.

It might be argued that this is an unnecessary additional requirement, given that, if the ownership of productive wealth is widely held, workers will presumably already have significant power to influence the conditions under which they labour. However, this is not necessarily the case. It is possible that, even if the ownership of productive wealth is widely distributed and evenly held, it would not confer much power on workers at the individual level. To understand this, consider an individual worker who owns a relatively equal share of the productive wealth of society through a diversified stock portfolio. The individual worker might own shares in a number of companies, but not necessarily in the company that he works for. Even if the individual worker did own shares in that specific company, it would not confer any significant right to affect the policies or direction of that company.

In writing about the position of workers in a POD, Hsieh argues that without "explicit institutional guarantees" (Hsieh 2012: 152) there is no reason to think that the widespread ownership of productive wealth will necessarily lead to workers assuming a greater level of control in the workplace. Freeman therefore appears to be correct in arguing that additional measures are required if workers are to have meaningful control over the conditions under which they labour. To demonstrate that justice as fairness does indeed require that workers have this increased control, Freeman turns to Rawls's idea of self-respect in order to argue that the requirements of FEO must be broadened in order to give workers opportunities to control the conditions under which they labour. Such an amendment would connect the good of self-respect more closely with the outcome of the principle of FEO itself:



“[T]he principle of fair equality of opportunity requires not simply (as Rawls says) fair opportunities to compete for open positions and ongoing opportunities to take advantage of educational and cultural resources; FEO also requires ongoing opportunities for citizens to exercise economic powers and some degree of freedom and control in their work, thereby assuming a degree of initiative and responsibility. (Freeman 2013: 32)

Freeman argues that he is justified in making an amendment to FEO based on the connection between self-respect and labour. Self-respect here means “a psychological attitude grounded in the sense of one’s own value and conviction that one’s conception of the good, or rational life plan, is worth pursuing, and confidence that one had the abilities to successfully fulfil one’s intention” (Freeman 2007: 482). For Rawls the primary good of self-respect is the most important of the five because without it “nothing may seem worth doing” (Rawls 1999: 386). Self-respect is what gives individuals the motivation to pursue their conception of the good. What Freeman argues is that the subservient position of less-skilled workers, even in a POD, damages their self-respect. Only by giving them “ongoing opportunities to play an active role and take initiatives in their workplace, and not [to] be subject to potentially rigid work restrictions” (Freeman 2013: 33) can the social bases of self-respect be strengthened. The question is how this increased economic power can be justified from within justice as fairness.

Freeman argues that there are sufficient grounds in Rawls’s work on which to base his amendment that grants workers increased economic power. He approvingly cites Rawls’s discussion of the good of social union, in which Rawls argues in favour of a ‘kinder’ division of labour than is the norm in capitalist societies:

A well-ordered society does not do away with the division of labour in the most general sense. To be sure, the worst aspects of this division can be surmounted: no one need be servilely dependent on others and made to choose between monotonous and routine occupations which are deadening to human thought and sensibility. Each can be offered a variety of tasks so that the different elements of his nature find suitable expression. But even when work is meaningful for all, we cannot overcome, nor should we wish to, our dependence on others... The division of labour is overcome not by each becoming complete in himself, but by willing and meaningful work within a just social union of social unions in which all can freely participate as they so incline. (Rawls 1999: 463)



Rawls is therefore claiming that a society which is regulated by justice as fairness, will be able to avoid some of the downsides of the division of labour. Ideally, there will be a broad enough range of employment opportunities available so that most people can find a way to contribute to society, in a manner which fits with their conception of the good. In other words, the state must play an active role in maintaining a wide variety of employment opportunities. In order to explain why the state has the obligation to do this, and to provide workers with economic powers that come about by owning a relatively equal share of the society's productive wealth, Freeman proposes a 'friendly amendment' to FEO.

He asks the reader to imagine two different social systems. One is a capitalist welfare-state, the other a POD. In the capitalist state, the hourly wage received by workers of the least-advantaged class, (after transfer payments have been made from the top earners to those at the bottom), is \$22 per hour, providing them with an annual income of \$44 000. In the POD, the least-advantaged workers receive \$15 per hour and the return on the share of the productive wealth that they own, leaving them with an annual income of \$36 000. Freeman argues that least-advantaged workers may prefer the capitalist welfare-state in which they earn a higher income to a POD where they earn less, but presumably have more influence in determining the labour conditions. It does seem conceivable that many workers would not have an interest in deciding how the firm in which they work should be run, as long as they are compensated in higher wages. If this is the case, and the capitalist welfare-state does protect the fair value of the political liberties and (Rawls's version of) FEO, then there are no grounds for preferring POD over WSC. It might just be that most workers would prefer higher wages to increased influence in the running of the firm. The difference principle would then mandate that WSC be preferred over POD, as the former would ensure that the least advantaged receive a greater share of primary goods than would be the case under POD.

Freeman argues that the only way to deal with this problem is to broaden the understanding of FEO. He claims that "for less skilled workers to be able to exercise developed capacities not just in their leisure time but in their workplace as well, by overcoming the subservience of the wage relationship through the assumption of economic powers and responsibilities, can play a crucial role in providing social bases of self-respect for free and equal citizens" (Freeman 2013: 33). Only by making this kind of consideration part of FEO can the objection that WSC might provide a larger bundle of primary goods, be overcome. This is because FEO is lexically prior to the difference principle and must therefore be satisfied first.

Freeman admits that advocates of capitalism might not find this line of reasoning convincing because it effectively forces workers to prefer having economic agency to having a greater level of income and wealth. Freeman counters this argument by appealing to Rawls's Aristotelian Principle. Rawls argues that there is "a psychological law, or tendency that, other things being equal, people enjoy the exercise of their developed faculties, and their enjoyment increases the more developed their faculties and the more complex the activities engaged in, become" (Freeman 2007: 463). In other words, individuals desire control over the tasks that they are engaged in and prefer a greater degree of control and complexity to tasks that do not give them some control. The danger here is that by altering FEO in this way, it risks damaging justice as fairness's commitment to being neutral with regard to different conceptions of the good. It is obvious that having the kinds of powers that the amended FEO grants would make it all but impossible for the owner of the means of production to exercise either of the two rights associated with private ownership. Owners would be significantly restricted in their ability to alienate their property as well as exercise their usage rights over it.

Freeman recognises the problems that might be caused by his amendment of FEO, but argues that it is something that would be chosen by individuals behind the veil of ignorance because everyone would want "ongoing opportunities in their work situation to exercise economic powers and responsibilities" (Freeman 2013: 34) in order to achieve their conception of the good and to maintain their self-respect. Furthermore, says Freeman the amendment does not *require* that all workers make use of their economic powers; those who have no interest in exercising such powers may simply ignore them.

My view is that Freeman's 'friendly amendment' does not, in fact, succeed in justifying POD. If FEO were to be amended in line with Freeman's proposal, then Rawls could not be said to be neutral between systems of private and collective ownership of the means of production. As we have already seen, the two essential components of private property are the right to exclusively possess and the right to alienate property. If workers are to have the economic powers that Freeman proposes, the rights of the owners of the means of production would be curtailed to such an extent that they would hardly exist. Under Freeman's proposal, workers would have the ongoing ability to decide how the firm should be run, including how capital is employed and whether or not it should be alienated. If workers were to have these powers, then the owners no longer have the *exclusive* right over their property. This means that the private property system, which is the feature that separates POD from market socialism, would be dissolved.

## 2.2 Williamson's egalitarian POD

In the revised edition of *A Theory of Justice*, Rawls writes that one of the shortcomings of the original edition of the text was that it did not adequately distinguish between POD and welfare-state capitalism (Rawls 1999: xiv). Both allow for the private ownership of the means of production, but it is only in POD that institutions are in place to make sure that this ownership does not become concentrated in the hands of a few. He goes on to explain that:

[In POD] the basic institutions must from the outset be put in the hands of citizens generally, and not only a few, the productive means to be fully cooperating members of society. The emphasis falls on the steady dispersal over time of the ownership of capital and resources by the laws of inheritance and bequest, on fair equality of opportunity secured by provisions for education and training and the like, as well as on institutions that support the fair value of political liberty. (Rawls 1999: xv)

In the previous chapter, we saw that Rawls provides a more comprehensive, but by no means complete, description of the institutions associated with POD. However, Rawls's comments on the issue at hand are all too brief. In an attempt to remedy this situation, Williamson presents what he calls an 'egalitarian' interpretation of POD. In the following section I present this proposal for an egalitarian POD and consider whether there is sufficient justification from within justice as fairness for strongly egalitarian institutions and policies that he argues for.

In his sketch of an egalitarian POD, Williamson deals with two separate aspects of POD, both of which have relevance for the status of property rights. The first issue is to decide what kind of property should be widely held; the second is how relatively broad ownership of productive resources is to be maintained over time. Williamson suggests three different ways of dealing with these two questions:

1. Making sure that each household owns assets with a minimum value;
2. Putting policies in place to make sure that each household owns, or has a significant stake in a business; and
3. Using some form of collective ownership.

In what follows, I briefly explain each of these suggestions as well as the difficulties associated with each of them.

Before discussing Williamson's arguments, it needs to be made clear that he adopts a decidedly egalitarian position which is not explicitly endorsed by Rawls himself. Rawls only goes so far as to say that in a POD "all citizens [are in] a position to manage their own affairs on a footing of a suitable degree of social and economic equality" (Rawls 2001: 137), not that *every* member of society should necessarily own an equal share of the productive wealth of the society. In Williamson's egalitarian conception of POD, every citizen possesses productive wealth and the gap between the most advantaged and least-advantaged groups is much smaller than is currently the case in capitalist countries.

### *Household wealth*

Williamson's first suggestion is that tax policies and the system of property rights should be adjusted in such a manner that the poorest 10 percent of households have a net worth of at least \$100 000. This amount is roughly equivalent to the net value of the median US household in 2006. Williamson admits that "using the median level of family wealth as a benchmark for the minimum household may seem overly generous ... until we consider that this median was in 2004 just more than one-fifth of the mean family worth" (Williamson 2009: 440). My aim is not to discuss the specifics of Williamson's suggestion. It is sufficient to note that he is arguing for a far more egalitarian distribution of wealth than is currently the case in the US.

Williamson argues that the POD cannot be neutral with regards to the composition of this wealth because one of the important features that separates POD from WSC is the fact that the former, unlike the latter, protects the fair value of the political liberties. For this requirement to hold, Williamson argues that at least half of the value of the holdings should be in stocks, held via a mutual fund. The reason for this is that in a capitalist society it is individuals, through their control of corporations, who have a corrupting influence on the political process. Making sure that corporations have a broad ownership prevents this. The remainder of the wealth owned by typical households would be tied up in their homes (which Williamson estimates to have a value of \$30 000) and they should also hold around \$20 000 in cash savings.

Williamson anticipates an immediate concern relating to this scheme: How could this distribution be maintained over time? It seems possible, even likely, that in a free market system households might engage in transactions that lead them to lose their capital. Also, wealthier households might offer to buy the stocks of poorer households in order to gain control of certain enterprises. Williamson notes that this is what happened in the former Soviet Union where workers in state-owned enterprises sold their ownership vouchers which were allocated

to them after the collapse of communism.<sup>9</sup> To address this concern, Williamson suggests a set of policies that will maintain the stability of the holdings over time (Williamson 2009: 403-404). These include subsidised mortgages for the poor and laws that would allow tenants to buy the property they occupy after a certain period of time. Furthermore, Williamson argues that poor households would only be allowed to spend their cash holdings on things that are likely to have long-term benefits, such as education or purchasing a vehicle. He also suggests that poor households could protect themselves against losing their assets by purchasing a form of insurance against bankruptcy.

### *An economy of small entrepreneurs*

Another alternative that Williamson very briefly discusses is an economy that consists of a large number of small entrepreneurs. In this ideal economy, each household either operates or has a substantial stake in a firm. Williamson does not consider a society of small entrepreneurs to be either feasible or desirable. His opposition to the notion is based on two main concerns. The first is that a nation of small entrepreneurs would, over time, turn into a nation of large corporations, since successful entrepreneurs would leverage their success to amass larger and larger amounts of capital. Over time, this would lead to the means of production again falling into the hands of a few.

Williamson's second worry is that a large number of small businesses would not be able to achieve the economies of scale that make modern corporations so efficient. These small businesses would also be limited in that they would not have the resources to develop the kinds of technology that allows firms to create new products, which in turn improve the standard of living for consumers. These efficiency problems may not be decisive reasons for rejecting the idea of a nation of small entrepreneurs, but if the losses of efficiency were so great that they worsened the position of the worst-off members of society, then the difference principle would prohibit this form of economic association.

### *A 'socialist' POD*

Williamson argues that the only way to make a POD feasible, is by using mechanisms that have typically been associated with socialism. He mentions three methods by which the ownership of wealth could be maintained broadly. The first is John Roemer's (1994) market

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<sup>9</sup> See 'Twenty Lessons from the Experience of Privatisation in Transition Economies' by W. Andreff in *Privatisation and Structural Change in Transition Economies* edited by Y. Kalyuzhnova, W. Andreff (esp. page 51 – 53) for a detailed discussion of the way privatisation was implemented in Russia in the 1990's and what its effects were.

socialist system in which individuals have coupons that allow them to allocate capital among firms. These coupons can be traded but cannot be sold. They are meant to serve as a means by which everyone in society has a stake in the ownership of capital during the course of their lives. The second option is to make it a legal requirement that firms operate as cooperatives, with each employee directly owning shares. Each employee would have a say in the running of the firm through their ownership of shares. A final alternative that Williamson considers is that public institutions, such as pension funds or sovereign wealth funds, might own shares in companies on behalf of the public. These funds would then distribute returns on the capital to citizens from time to time.

Williamson argues that ultimately it would be necessary for one or more of the alternatives to be used to create a POD. However, we are bound to ask: if citizens can only own coupons which they cannot sell, can such a system really be considered as permitting private ownership? And could any regime that did impose such constraints on ownership still be considered a property-owning democracy? If one of the essential features of private ownership is the right to alienate property, then a coupon-system does not meet the standard for private ownership. Likewise, the requirement that all businesses operate as cooperatives is also antithetical to the idea of private ownership. The idea that public institutions own shares on behalf of the public is also plainly socialist – it is simply another way for collective control to be exercised over capital. Of course, it is possible that there could be funds (like Norway’s sovereign wealth fund) that hold shares in companies on behalf of the public, but these funds do not prevent private ownership of the means of production.

The problem with these three suggestions, and indeed with Williamson’s entire approach, is that the idea of a POD rather than the principles of justice as fairness are being used to consider the institutions necessary for justice. Williamson is taking the ‘picture’ of POD that has been sketched and is using it to construct arguments for changes that need to be made to institutions. This is most obviously the case with the idea that in a POD the means of production will be widely and relatively equally held. Williamson is so determined to ensure that there is a broad and equal holding of capital that he virtually gives up on private property. In my view this is the wrong way to go about meeting the requirements of justice as fairness. In Section 2.5 of this chapter, I explain the shortcomings of Williamson’s approach in greater detail and I attempt to provide an alternative account of making changes to the institutions of the basic structure to bring them in line with what is required by justice as fairness.

### 2.3 The *ex ante* / *ex post* distinction

My third argument against the internal coherency of POD is that the distinction between *ex ante* distribution and *ex post* redistribution (which is one of the essential characteristics of POD), does not make sense. In Rawls's view, one of the major differences between POD and WSC is that the latter allows a small minority to acquire a monopoly on the means of production (Rawls 2001: 139), while the former ensures that all citizens have access to productive capital. This is how Rawls describes the difference:

Property-owning democracy avoids this [the concentration of wealth in the hands of the few], not by the redistribution of income to those with less at the end of each *period*, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each *period*, all this against a background of fair equality of opportunity. (Rawls 2001: 139; my own emphasis)

This distinction between different 'periods' is also used by O'Neill in his discussion of POD. He argues that while the *ex post* redistribution of income may improve the position of the least advantaged, it is only by means of *ex ante* policies that economic power can be shifted away from the most advantaged group (O'Neill 2012: 88). What O'Neill means with the term *ex ante* distribution, or what Rawls is referring to when he uses the term 'period', is difficult to determine. The claim seems to be that real productive capital must be put into the hands of citizens, along with the opportunity to develop their own human capital. The issue of human capital can be set aside. It appears to be relatively uncontroversial that FEO requires that educational resources be distributed in such a manner that they provide all citizens with relatively equal opportunities to develop their skills and talents. What is far more difficult to understand is how citizens could have productive resources placed in their hands *ex ante*.

The first problem with this line of reasoning about the allocation of productive resources is that there is no basis on which to simply give citizens resources within the framework of justice as fairness. Rawls argues against any kind of unconditional basic income of the sort proposed by Van Parijs (1991, 1995) on the basis that it violates the condition that social cooperation be regulated by reciprocity (Rawls 2001: 179). In the next chapter I discuss some of the issues surrounding income grants, but for the moment I will argue that if justice as fairness does not provide for an unconditional basic income grant, then there are also no grounds for unconditionally granting citizens a stake in the economy. A shareholder stake would be



something like Ackerman's (2003: 41) suggestion that each citizen should receive \$80 000 from the government on reaching the age of 21. This kind of grant from the government, argues Ackerman, would give individuals real opportunities to decide what they would like to do with their lives.

Kerr (2015: 72-73) uses the term 'pre-distribution' to refer to policies that would lead to capital being more broadly owned in a POD, but admits that it is not clear what exactly to make of this term. He argues that some alternative forms of taxation like a land tax or a wealth tax might be thought of as predistribution, but acknowledges that even these forms of tax are in a sense redistributive. What Rawls and O'Neill seem to suggest is that the state must provide a way for each citizen obtains access to productive capital in some manner. The problem is that justice as fairness does not allow for this kind of policy. The reason for this is that any shareholder stake could automatically be converted into unconditional basic income. Capital generates a return, therefore granting capital to individuals unconditionally is the same thing as granting them income unconditionally. Unconditional stakeholder grants are de facto the same thing as unconditional basic incomes.

The only kind of income that could be granted in any kind of *ex ante* fashion, which would be permitted by justice as fairness, is what is referred to as a participation income. This is an income that is paid to each citizen "conditional on [their] participation in the social contract (through some form of recognised social contribution)" (Lanzi & Delbono 2002: 2). Freeman similarly considers that all citizens might be entitled to some kind of income based on performing their civic duties such as voting and doing jury duty (Freeman 2007: 143). However, even if this participation income could be successfully defended within the framework of justice as fairness, it is very different to putting productive resources into the hands of citizens generally. My view is that the difference principle might mandate policies that make it possible for the least-advantaged to gain access to resources more easily. However, this would depend on the specific conditions in question and would be contingent on the process being based on reciprocity. One example of how this might be achieved is if the state were to offer low interest loans to the least-advantaged, which would allow them to purchase productive resources at a lower price than the more advantaged citizens. Such a policy, if successfully carried out, would allow members of the least-advantaged group to obtain



productive resources more easily than the wealthy and make it relatively more difficult for the wealthy to accumulate more capital.<sup>10</sup>

The second, and more powerful argument against the *ex ante* / *ex post* distinction is that it simply does not make sense to think of the economy as functioning in discrete periods. The economy is not a board game in which there are discrete, identifiable rounds in which all players are allocated resources, allowed to play, and then receive additional resources based on their position. Economic activity is a continuous process that is not divided into identifiable stages. The tax year, or the financial year of a company may create the impression that there are discrete ‘periods’ of activities, but this is misleading. Without discrete time ‘periods’ it is not clear how resources could be distributed *ex ante*. Perhaps Rawls is suggesting that resources should continuously be made available to everyone, particularly the least-advantaged. This fits with what Rawls (1999: 243) has said about the possibility of a negative income for the least-advantaged which would act to ‘top-up’ their earnings. However, these income supplements can only be funded by redirecting the tax collected from the wealthy into the hands of the least-advantaged. This is a classic tax-and-redistribute policy and would fall squarely within the *ex post* category.

Even if the economy were to be thought of as operating on the basis of discrete periods, it would still be difficult to make sense as to how resources are to be distributed. First, one would have to identify the specific resources to be distributed. That is no easy task. Resources, as we tend to think of them today, are already the result of productive activity (Narveson 2013: 114). Resources that would be useful in any modern economy (computers, tools, etc.) only exist as a result of human activity. It might make more sense if the *ex ante* distribution of resources is meant to apply to natural resources, such as gold or coal, but even this approach has problems. Firstly, the things that we consider useful natural resources are dependent on the specific material conditions of the society in question. Uranium has no value in a society without nuclear reactors. The only way to turn those resources into something valuable is through cooperation and trade. Over time this will lead to an unequal holding of resources. The only way in which the state could ensure the maintenance of a relatively broad distribution of wealth is if it engaged in the redistribution of existing wealth on a continuous basis.

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<sup>10</sup> Policies of this kind have been in place for several decades in countries around the world. One prominent example is the use of government backed low interest mortgages to allow poor families to purchase homes.

The problem with this approach is that if the state were to continuously redistribute holdings to maintain a relatively broad holding, much of the incentive for individuals to exploit these resources and turn them into things that people have reason to value, will disappear. In fact, it is precisely the security of their property rights that causes people to create resources that others can use (Narveson 2013: 114). The constant threat of expropriation would serve as a serious disincentive for economic activity. It might be argued, perhaps, that existing capitalist systems use tax-and-transfer policies without destroying the incentives that motivate people to engage in productive activities. Williamson makes this point when he argues that “once the background institutions for allocating property [in a POD] are established, the system should operate of its own accord to produce a less concentrated, far wider distribution of property, with no ‘interference’ in the everyday operations of the economy required beyond that present in the existing system of periodic taxation” (Williamson 2009: 449). However, if this is Williamson’s point, then it would appear that POD is little different from WSC except that it levies an exceptionally heavy tax burden. It is difficult to see how the institutions of POD could maintain a broad interference in the economy to prevent certain individuals from obtaining too much capital. Maintaining a relatively equal ownership of capital will require a vast bureaucracy to ensure that no one gets their hands on too many productive assets. There is no reason to suppose that initial allocation of relatively equal holdings will necessarily be maintained over time, especially in a market-based economy like POD (Vallier 2015: 289).

It might be argued that in a well-ordered society the need for subsidies or for taking capital from the most productive in order to maintain a relatively broad ownership of productive wealth, would disappear. However, Vallier (*ibid.*) has shown that a POD would suffer from severe incentive problems, which would cause difficulties even within a well-ordered society. The reason for this is that those who are successful at accumulating capital will have to be prevented from owning more than a certain amount of capital in order to maintain a broad distribution of productive resources. This means that there will need to be a large bureaucracy to keep track of the relative position of each citizen. This would surely have significant effects on productivity. It would act as a disincentive for the most productive citizens from producing more while at the same time doing little to promote the well-being of those who are relatively less productive. Hume makes a similar point about the problems that would face any scheme that attempted to maintain an egalitarian distribution over time:

Render possession ever so equal, men’s different degrees of art, care and industry will immediately break that equality. Or if you check those virtues, you

reduce society to the most extreme indigence; and instead of preventing want and beggary in a few, render it unavoidable to the whole community.  
(Hume, 1739 [1978]: 194)

The point here is not that any redistributive scheme will have the effect of disincentivising some kinds of productive activity. This is likely to be true of any system in which redistribution takes place. The concern here is the sheer scale of the redistributive efforts required to maintain a relatively egalitarian distribution and the bureaucratic apparatus required to enforce it. Arneson (1986: 145) argues that it is not the fact that massive redistribution is required to maintain an egalitarian distribution of productive wealth that is a concern; it is the enormous bureaucracy required to keep track of and enforce the distribution that is the danger. His fear is that this overwhelmingly powerful bureaucracy will become a tyrannical force. It is also difficult to see how an arrangement that is likely to have such a significant effect on economic productivity could be justified from behind the veil of ignorance. Lower economic growth, even if more broadly shared, might lead to the least-advantaged having a smaller share of income and wealth than an alternative free market system that generates higher growth and transfers income from the wealthy to the poor by means of taxes.

A possible way out of the above-mentioned conundrum might be to argue that the social bases of self-respect, as one of the most important elements constituting the index of primary goods, requires a more egalitarian distribution of income and wealth because a highly unequal distribution is damaging to the self-respect of the least-advantaged. This would be the case, even if it led to the least-advantaged having less income and wealth in absolute terms, than they might otherwise have had. This line of argument assumes that the social bases of self-respect are determined by one's access to positional goods. Pogge argues that it might be possible to count a "person's relative income and wealth (measured perhaps as a percentage of the average) as one social basis of self-respect" (Pogge 2007: 116). This would mean that the difference principle would be sensitive to the relative position of the least advantaged group in society. It would not be sufficient for the institutions that govern the basic structure to provide the highest possible level of income and wealth to the least advantaged. Their wealth and income, relative to that of the most advantaged would also play a role.

There is support for Pogge's argument from within justice as fairness. Rawls argues that there are certain social conditions which may "encourage hostile outbreaks of envy" (Rawls 1999: 535) in which citizens lose self-confidence in their own worth. This can happen when the social

structure makes the least-advantaged acutely aware of their position or when the least-advantaged feel that their position offers no hope of improvement leaving them with no choice but to reduce the fortune of the most advantaged in order to “alleviate their feelings of anguish and inferiority” (Rawls 1999: 535). However, Rawls argues that this is not likely to happen in a well-ordered society which meets the requirements of justice because if the background institutions are functioning as they should, says Rawls the level of inequality is likely to be relatively low (ibid. 536).

My own view is that this is not a matter which can be settled without empirical investigation. It is not obvious that the position that a person occupies at work is necessarily as important as proponents of POD make it out to be. Dowding, for instance, argues that it “is not clear that respect and self-respect can come about only if one is a property-holder or has a job one considers worthwhile” (Dowding 2012: 629). In my view this is correct. Committing to the idea that it is only possible to achieve an acceptable level of self-respect as a property-owner would veer dangerously close to endorsing a perfectionist conception of the good. It seems clear that many people working in modern capitalist economies do not suffer from a lack of self-respect because they are not property owners.

#### *2.4 Institutions and inequality*

Given Rawls’s commitment to equality that is entailed in the protection of the fair value of the political liberties and the partial commitment to the principle of redress that forms a component of the difference principle, we are in a position to discuss the extent of inequality permitted by justice as fairness. I will argue that there is limited scope within justice as fairness to argue against many of the inequalities of economic power that Rawls and other proponents of POD seem so concerned with.

The first reason Rawls gives for opposing inequality is that “it seems wrong that some or much of society should be amply provided for, while many, or even a few, suffer hardship” (Rawls 2001: 130). This is not, strictly speaking, an argument against inequality, but rather an argument against preventable privation. The problem is solved not by bringing about a greater degree of equality, but by addressing the privations suffered by the least advantaged. In writing about the diversity of objections to inequality, Scanlon (2002) argues that many of the arguments in favour of equality are in fact based on other concerns, such as a humanitarian duty to those living in privation, which may, as a consequence, result in greater equality. He argues that this is particularly true of arguments in favour of providing aid to those in distress:

No intrinsic importance is attached to narrowing or eliminating the gap between rich and poor; this gap is important only because it provides an opportunity – a way of reducing the suffering of some without causing others to suffer a similar fate – and the strength of this reason for moving toward greater equality is a function of the urgency of the claims of those who are worse off, not of the magnitude of the gap which separate them from their more fortunate neighbours. (Scanlon 2002: 42)

The concern here is not with inequality itself, but with the status of those who are the least-advantaged. The aim is to help the least-advantaged, not primarily to bring about a greater level of equality. The so-called ‘levelling-down’ argument against equality makes this clear. The levelling-down argument raises an objection to the idea that material equality is itself valuable. Consider an island society of two people, Jack and Jill. Jack has a large, comfortable house while Jill has a small, inferior dwelling that she has constructed from driftwood. In this situation there is a significant inequality in terms of accommodation. During a storm, a lightning strike destroys Jack’s house. After the storm, he salvages what he can, but is only able to construct a dwelling of the same standard as that of Jill’s. They are now equal in terms of their accommodation. A greater level of equality now holds, but no one is better off than they were before. A strict commitment to equality would imply that the situation after the storm is preferable to the situation before the storm. This is a difficult commitment to hold, especially for Rawls. Behind the veil of ignorance, individuals cannot act on irrational envy, which means that they cannot desire that others have less simply because it will reduce the level of inequality. We can thus say that Rawls’s argument that it is unjust that some suffer privation while others live in comfort has more to do with the absolute position of those suffering privation than it does with the relative position between the two. It is not the inequality that causes the injustice. It is the actual level of privation that some people suffer that is the problem that Rawls is actually concerned about. Improving the situation of those who have suffered privation of some kind may indeed reduce inequality, but the reason for rectifying the situation is not to reduce inequality, it is to prevent unnecessary suffering.

It could be argued that the levelling-down objection is not relevant to Rawls’s argument because the difference principle applies to how cooperation between citizens is to be regulated and is not meant to compare their relative wealth or poverty. This means that the levelling down criticism misses the mark. I think that this is an important point, but that there is still a way in which the levelling-down argument can be used to illustrate some interesting implications of

the difference principle. The aim of the difference principle is to maximise “the index of these goods [primary goods] which a representative individual can look forward to” (Rawls 1999: 79) over the course of their lives. In other words, the aim of the difference principle is to regulate cooperation so that the lifetime prospects of the least-advantaged are maximised. This means that when the difference principle is used to compare various outcomes that are possible under different institutional arrangements, we will need a scale of some kind in order to compare the index of lifetime primary goods that the least-advantaged will hold. This is can only be done by rough approximation, but is necessary if the difference principle is to have any role in making decisions about the appropriate mix of institutions that will regulate the basic structure of society.

Consider the example of a society that currently has a set of institutions, let us call this set X. In order to improve the position of the least-advantaged, policy makers come up with two alternatives, A and B. Each of the alternatives will modify the existing set of institutions with the aim of improving the position of the least advantaged. Let us assume that both policies protect the basic liberties and provide for fair equality of opportunity. In order to choose between the two, we need to estimate which alternative, A or B, will maximise the expected lifetime index of primary goods that accrues to the least advantaged group. For the purposes of the example we can define the least advantaged, as Rawls does, as those who earn less than the median income in the society (Rawls 1999: 84). To answer the question of which course of action to take, the expected lifetime index of primary goods held by the least-advantaged in each scenario must be compared. This can only be done by estimating what this index value is likely to be for each course of action. Let us assume that course A offers an index score of 40, while course B offers 50. This means that course B should be chosen. What this example illustrates is that, while the difference principle is concerned with the terms of cooperation among citizens, it only does so because of the outcome that this cooperation produces. This means that Rawls is concerned with inequality only in so far as it affects the lifetime index of the least-advantaged, not with inequality per se.

The second reason Rawls gives for limiting social and economic inequalities is to prevent the formation of a social and economic elite that could come to dominate the rest of society. The worry is that inequalities in social status, income and wealth could be translated into political power that would further entrench these inequalities, leading to the formation of a hereditary elite. Again, the issue here is not that inequality itself is undesirable, but rather that the consequences of certain kinds of inequality could lead to other wrongs. The issue of protecting

the fair value of the political liberties has already been dealt with in the previous chapter. For the moment we can say that preventing inequalities in social status and economic power are not the only ways to prevent the political process from being corrupted.

Rawls's third reason for opposing inequality suffers from similar defects. He argues that "significant political and economic inequalities are often associated with inequalities of social status that encourage those of lower status to be viewed both by themselves and by others as inferior" (Rawls 2001: 131) and that this does grave damage to the self-respect of the least advantaged. Again, the point here is that social and economic inequalities may have undesirable consequences. It is not the inequality itself that is undesirable, but its effects. It might be argued that the source of the inequality and its effects are inseparable and to condemn the one is to condemn the other. However, this need not be the case. There are inequalities in virtually all aspects of life, from work, to education and even in leisure activities. These inequalities, which are often manifested as hierarchies, do not necessarily lead those at the lower end of the hierarchy to experience a diminished sense of self-esteem. The reason for and the basis on which the inequalities are established and maintained play a vital role in determining whether or not those who have relatively less power or influence lose their sense of self-respect. It is not necessarily the case that large inequalities translate into lowered self-respect of the least advantaged.

What I have tried to show with the preceding three arguments is that there is little support from within justice as fairness for a strongly egalitarian distribution of economic power. This finding, together with the arguments against Freeman's and Williamson's proposals for maintaining a relatively equal distribution of ownership in a POD, show that there is good reason to abandon the appeal to this regime type in order to think about justice. In the following section I take this argument further. I show that it is not only POD that should be abandoned, but the use of *any* ideal regime types as a whole that should be rejected.

### **3. Ideal and non-ideal theory**

In the previous section I raised questions about how the institutions of POD would maintain equality while at the same time respecting liberty. It might be argued that I have been attacking a straw man, much in the same way that Rawls attacks WSC. Perhaps it is not necessary to give a complete description of the institutions of POD in order to demonstrate its desirability. However, this is not Rawls's view. He argues that giving a relatively complete description is a necessary condition for reaching wide reflective equilibrium about the principles of justice as



fairness. This is so because the moral acceptability of the two principles can only be determined when they are brought to bear on specific cases. In Rawls's words:

Another reason for reviewing these matters [the question as to which institutions would constitute a just basic structure] is to sketch in more detail the kind of background institutions that seem necessary when we take seriously the idea that society is a fair system of cooperation between free and equal citizens from one generation to the next. It is also important to trace out, if only in a rough and ready way, the institutional content of the two principles of justice. We need to do this before we can endorse these principles, even provisionally. This is because the idea of reflective equilibrium involves our accepting the implications of ideals and first principles in particular cases as they arise (Rawls 2001: 136).

Another reason why Rawls and other proponents of POD spend considerable effort in giving a more detailed description of this regime type is because it is supposed to give practical content to justice as fairness. Thus, at least a third of Williamson and O'Neill's book on POD is devoted to "the question of how property-owning democracy might begin to be realized in practice" (Williamson & O'Neill 2012: 12). There are several suggestions in the book as to what an actual POD might look like, for example Williamson's blueprint for turning the United States into a POD within 30 years. The aim of these types of suggestion is to show what a just society might look like by taking Rawls's sketch of POD and using it as the basis for suggestions for creating a more just society. In my view this is a mistake. Doing this is to extend ideal theory to realms where it cannot play a constructive role. In what follows, I show that there are limits to using ideal theory to speculate about the specific institutions necessary for creating a just basic structure.

### *3.1 The limits of ideal theory*

As discussed in the Chapter 1, Rawls formulates principles of justice that are meant to apply to the basic structure of a well-ordered society. A well-ordered society is one in which "everyone accepts and knows that others accept the same principles of justice, and the basic social institutions are known to satisfy these principles" (Freeman 2012: 172). In other words, a well-ordered society manifests the principles of justice through the institutions that constitute the basic structure. The members of society accept this and do not act in ways that would subvert the functioning of these institutions. Rawls argues that once the principles that are meant to regulate a well-ordered society have been determined, they can serve as a guide for what is



required in non-ideal circumstances. Seen in this light, ideal theory can be thought of as preceding non-ideal theory, rather than simply being separate from it. Freeman explains that non-ideal theory “is the application of ideal theory to non-ideal circumstances” (Freeman 2012: 183). In other words, the principles set out in ideal theory guide our thinking, and “[give] us the direction in which we should be moving to reach a (minimally) just society” (Robeyns 2008: 234).

The role of non-ideal theory is to apply the principles worked out in ideal theory to non-ideal circumstances – that is, circumstances in which society is not well-ordered and the institutions of the basic structure do not aim at a particular conception of justice. Writing about the application of non-ideal theory to the question of global justice, Rawls explains that ideal theory provides a moral framework for making decisions:

Non-ideal theory asks how the ideal conception of a society of well-ordered peoples might be achieved, or at least worked toward, generally in gradual steps. It looks for policies and sources of actions likely to be effective and politically possible as well as morally permissible for that purpose. So conceived, non-ideal theory presupposes that ideal theory is already on hand, for until the ideal is identified, at least in outline, non-ideal theory lacks an objective by reference to which its questions can be answered. (Rawls quoted in Freeman 2012: 185)

What Rawls argues here is that ideal theory provides the moral grounding for decisions about justice that need to be made in non-ideal circumstances. The purpose of ideal theory, so conceived, is to serve as a guide and not as a blueprint. It points those who seek to create a more just society in the right direction; it is not a blueprint of the destination.

My view is that Rawls is justified in using ideal theory for theorising about the principles of justice, but that using ideal types of regimes, such as POD, to determine which institutions and policies are necessary to create a just basic structure for a society, is not justified. The reason for this is that the precise mix of institutions will depend on the historical and material conditions of the society in question. Rawls himself acknowledges this when he says that the question about whether a society should permit the private ownership of the means of production and natural resources depends on its historical circumstances (Rawls 2001: 139), but then fails to see that these historical and material conditions will have an impact far beyond the decision of whether or not to permit private ownership. The particular history of a society, its level of technological development and its social norms will all have a significant impact on

the particular mix of institutions required to secure background justice. Promoting POD as an example of a type of society in which justice as fairness is manifested blinds us to the ways in which changes in social norms, technology and the level of resources available affect the institutions required to attain justice as fairness.

Furthermore, promoting POD as an ideal to be aimed at distracts us from the fact that it requires constant vigilance and intervention in order to maintain just institutions over time.<sup>11</sup> Positing POD as an ideal regime type may lead us to think that once the institutions and policies associated with POD are in place, no further work needs to be done to ensure that justice is maintained over time. This is a mistake. My view is that a description of the institutions that constitute POD is not necessary for reaching wide reflective equilibrium, or for illustrating the defects of WSC, nor is it useful as a model that proponents of justice as fairness should strive for. Those interested in justice as fairness need to take a different approach to figuring out which set of institutions is most likely to bring about a more just society. That is the topic of the next and final chapter.

### *3.2 The shortcomings of ideal types*

The final argument that I present against the use of ideal regimes for thinking about the demands of justice is based on an argument against G.A. Cohen's defence of socialism in his *Why not Socialism?* (2009). Cohen asks us to imagine a camping trip that can be organised on either a socialist or a capitalist basis. On the capitalist camping trip, each of the campers acts like a capitalist seeking to maximise the return on his or her productive assets. Each person brings along equipment and supplies for the trip, but refuses to share with anyone else. Cooperation is based on trade and each person aims to maximise their utility through trade. On the socialist version of the trip everyone's action is informed by socialist principles. The equipment and supplies are shared and everyone works together to ensure that the trip is a success and an enjoyable activity for all. Based on this, Cohen argues that it seems obvious that the socialist camping trip is the one which everyone would prefer. We should therefore reform our institutions accordingly so that our society would function more like a socialist camping trip.

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<sup>11</sup> This claim ties in with my criticisms of pure procedural justice as insufficient for ensuring just outcomes. See Chapter 4, Section 4.

In response to Cohen's book, Jason Brennan published *Why not Capitalism?* (2014). In this book he argues that Cohen's reasoning is deeply flawed and that his conclusion does not follow from his premises. Brennan summarises Cohen's argument as follows:

1. The socialist camping trip was better than the capitalist camping trip.
2. It would be desirable to make the world run like the socialist camping trip – having the world run like the socialist camping trip would be better than the way the world actually is.
3. Therefore, socialism is intrinsically more desirable than capitalism. (Brennan 2014: 54)

Brennan considers this to be an unsound argument because Cohen is not comparing like with like. Instead, he is comparing a version to socialism in which people acting in morally perfect ways, to a version of capitalism in which people are assumed to have flawed moral motivations (Brennan, 2014: 54). Brennan calls this type of reasoning the Cohen Fallacy. The Cohen fallacy takes the following form:

1. Socioeconomic regime X with perfect people is better than socioeconomic regime Y with real people.
2. Therefore X is intrinsically better than Y. (Brennan 2014: 55)

Brennan argues that Rawls is guilty of committing a similar error when comparing the merits of POD with the shortcomings of WSC (Brennan, 2014: 55).<sup>12</sup> In the previous section, I explained that there are two main reasons why Rawls introduces the idea of POD: to show up the shortcomings of WSC and to attempt to reach wide reflective equilibrium about the principles of justice. We are here concerned with the first reason. The problem is that in his comparison of POD with WSC, Rawls plays up the shortcomings of WSC while ignoring similar kinds of problems that are likely to affect his favoured regime type. The comparison he draws between POD and WSC is therefore an illegitimate one. Many proponents of POD and those who put forward arguments in favour of policies or institutions that are meant to build on Rawls's brief remarks on this regime type are guilty of same mistake. The argument that Rawls and other proponents of POD put forward takes the following form:

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<sup>12</sup> Mill makes a similar argument when discussing how to compare Communism with a private property regime on a legitimate basis. He argues that "If ... the choice were to be made between Communism ... and the present state of society with all its sufferings and injustices, ... all the difficulties, great or small, of Communism would be but as dust in the balance. But to make the comparison applicable, we must compare Communism at its best, with the regime of individual property, not as it is, but as it might be made" (Mill, 1994 [1848]: 14).

1. POD with citizens who always act to promote the principles of justice and are not adversely affected by incentives to do otherwise, is better than WSC in which citizens are affected by incentives which lead them to subvert just institutions.
2. Therefore, POD is preferable to WSC.

This is clearly an unsound argument. The premises do not lead to the conclusion. Furthermore, comparing WSC and POD on a like-for-like basis it would serve no purpose because the information required to choose between the two is simply not available within the confines of ideal theory. Ideal theory relies on idealisations that abstract from the particular in order to determine which principles should regulate social cooperation. This places limits on what it can achieve. Stretching ideal theory to encompass comparisons between ideal regime types is meaningless because it cannot capture the complex set of incentives that have such an enormous effect on the way that individuals and institutions interact with one another.

### 3.3 Moving toward justice

My view is that using POD to think about justice is to put the cart before the horse. Theorising about the institutions necessary to create a just society cannot provide any useful guidance unless the theorising is related in a rather direct way to a specific set of circumstances. What is needed instead is a constant evaluation of institutions and the outcomes they produce within the historical and social conditions in which they exist. When evaluating a given set of institutions or policies, they must not be compared with an ideal set of institutions, but should rather be weighed against the ideal principles of justice. Freeman makes this same point in the following way:

[I]t is the principles of justice that are to be applied to non-ideal circumstances to assess injustice and provide objectives to guide reform of existing laws and institutions. [Rawls] does not say that we are to appeal to a description of the conditions of a well-ordered society or its ideal institutions themselves to assess the justice of current laws and institutions. *It is not then ideal states of affairs that are being compared with current states of affairs, but ideal principles of justice that are compared with current laws and institutions.* (Freeman 2012: 194; emphasis mine)

Given that Rawls himself makes it clear that it is the principles themselves that must guide changes to institutions and policies in order for a society to come closer to meeting the requirements of justice as fairness, why did he devote a substantial part of *Justice as Fairness*:

*A Restatement* to discussing POD? As we have already seen, part of the reason was to clarify why he thought that WSC did not “realize all the main political values expressed by the two principles of justice” (Rawls 2001: 135). My view is that this could have been done without making use of ideal regime types. Rawls could simply have used existing institutions and policies found in capitalist welfare-states such as the US and UK and attempted to show why they do not meet the requirements of justice as fairness. It was not necessary to use ideal types to successfully argue against particular kinds of institutions or policies, as Rawls does when he argues that capitalist welfare-states do not respect the fair value of the political liberties. This argument could have been made by referring existing campaign finance laws, such as those in the United States, which clearly undermine the fair value of political liberties.<sup>13</sup>

Rawls’s other reason for discussing POD is that theorising about regime types that meet the requirements of justice as fairness is necessary to reach wide reflective equilibrium about the principles that animate his conception of justice. In other words, the consideration of ideal regime types is an important part of the process by which we attempt to verify whether justice as fairness is reasonable:

We cannot tell solely from the content of a political conception – from its principles and ideals – whether it is reasonable for us. Not only may our feelings and attitudes as we work through its implications in practice disclose considerations that its ideals and principles must be revised to accommodate, but we may find that our sentiments prevent us from carrying it out. On reflection we cannot live with it. (Rawls 2001: 136)

The relevant point here is that wide reflective equilibrium can only be achieved if we consider the implications of the principles of justice for the basic structure of society and the effect that they are likely to have in particular situations.

My view is that Rawls is correct in thinking that achieving wide reflective equilibrium requires that we speculate as to how the principles of justice would work in practice, but that it is not necessary to theorise about how *ideal types* of regimes might work. A better way to reach wide reflective equilibrium about justice as fairness is to continuously test whether *existing* institutions meet the requirements of justice as fairness. If they do not, then we can speculate

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<sup>13</sup> The ruling of the US Supreme Court in favour of Citizens United altered campaign finance laws to allow contributors to political campaigns to make unlimited contributions. Although Rawls’s writing on the issue predates this issue, it serves as a useful example.

about what would be required to bring them closer to meeting these requirements. Our considered judgement about what is required in a specific situation can then serve to bring us closer to achieving wide reflective equilibrium about the acceptability of justice as fairness. This means that theorising about the institutions that would constitute a POD is unnecessary. It is also unlikely to be of much use, since we can only know whether we can ‘live with’ a particular conception of justice if we test it against the particular circumstances in which we find ourselves.

The general point here is that ideal regime types are of little use because they cannot account for the infinite set of social conditions that might obtain. Take, for example, Schefczyk’s (2013) contribution to a special edition of a journal devoted to POD, in which he argues in favour of a ‘Realistically Utopian Welfare-State’ (RUWS). Schefczyk tries to show that Rawls’s argument for POD is incomplete and that a welfare-state, which includes some of the elements Rawls proposes for POD, would be even better than a POD at meeting the requirements of justice as fairness. Schefczyk presents his RUWS as having the following features:

1. Effective measures against the detrimental effects of lobbying, of party dominations and of other factors which tend to have a corrupting influence on the reasonableness of the political process;
2. A multi-layered system of political participation and representation that ensures that legislature expresses the political preferences of the electorate;
3. Effective measures in order to maintain a fully adequate culture of political debate;
4. Effective measures against discrimination (if necessary via affirmative action programs);
5. Unrestricted access to all levels of education irrespective of socio-economic background;
6. Effective measures against all unjustified forms of privileged access to offices and position; and
7. A participation income. (Schefczyk 2013: 194-195)

All of these hypothetical measures provide no assistance in achieving wide reflective equilibrium about the reasonableness of the principles of justice, nor do they provide any kind of useful argument against current injustices. None of these measures adds anything to our ability to reason through the implications of justice as fairness and decide whether it is reasonable.

Schefczyk might argue that the description of the RUWS he puts forward provides guidance as to how an existing society should go about changing its institutions to better meet the requirements of justice. However, as I have tried to show, this kind of guidance is singularly unhelpful and merely distracts proponents of justice as fairness from working out the most effective route to a more just society. An ideal regime type, whether it be a POD or a RUWS, is simply not useful for thinking about what justice demands. As Schuppert points out:

RUWS follows Rawlsian POD by being silent on crucial issues such as banking regulation, the governance of investments and the issue of actual control over capital. Ultimately, it therefore seems that RUWS does not present an attractive alternative to POD since it suffers from very similar problems and shortcomings as POD. (Schuppert 2013: 213)

This is precisely the problem associated with using an ideal regime type to argue about justice: the chosen regime type can never be specific enough to deal with all of the activities in a society that have an impact as to whether or not it is just. Schuppert claims that Schefczyk's account ignores important questions such as :

1. How are investments regulated under RUWS?
2. What kind of banking system will be in place?
3. What kinds of accumulations of capital and other resources are permissible under RUWS? (Schuppert 2013: 215)

The problem is that these kinds of questions can only be answered on a case by case basis. There can never be a complete description of all the institutions and policies necessary for a society to meet the requirements of justice as fairness. Schuppert argues that the only way to deal with the question as to what is required for a just political economy is "an in-depth engagement with the economy of a just society (across time!) which will go beyond the mono-dimensional solutions offered by Rawlsian POD and Schefczyk's RUWS" (ibid. 217). It is exactly this quest for ever more detailed accounts of what a POD might look like that makes it clear that ideal types cannot provide an effective guide to what justice requires.

My characterisation of the various attempts to think through what a POD might look like has possibly been overly harsh. It might be argued that thinking about the institutions necessary for creating a POD serves as an inspiration for efforts aimed at transforming existing institutions. There is something to say for this approach. O'Neill (2009: 391), for instance, argues that many of the policies necessary for creating a POD, such as the public financing of elections and other



policies designed to limit the influence of wealth on the political process, can be implemented without it being necessary to make large-scale changes to the distribution of ownership in the economy. A similar point can be made about the conditions of employment to which most people are subjected. For example, Hsieh's (2009: 408) argument that a POD must give workers significant control over the conditions in which they labour in order for them to develop a greater sense of their self-worth points to changes that can be made within existing institutional arrangements, without necessarily accepting the other aspects of POD. Seen in this light, the arguments in favour of POD and attempts to provide a more precise description of this regime type are not entirely without merit. However, my view is that there are simpler and more useful ways to come up with recommendations about how existing institutions should be altered to bring them closer to meeting the requirements of justice as fairness. In Chapter 4, I will follow up on what this kind of incremental change would look like as well as the criteria for measuring success. For now, suffice it to say that if justice as fairness is to be taken seriously, more thought needs to be given to dealing with the question of how a just basic structure can be created and maintained over time.

## **Conclusion**

In this chapter, I have identified three main major problems with using POD to try and achieve the aims of justice as fairness. First, I have argued that there are difficulties in reconciling the right to private property with the strongly egalitarian requirements of POD. In my view, this shows that POD is internally incoherent. It does not seem likely that the rights to private property and free exchange are compatible with a strongly egalitarian distribution of economic power. I have also tried to show that there is also limited support for this strongly egalitarian distribution within justice as fairness.

The second major problem that I have identified with Rawls's use of ideal regime types, and specifically his argument in favour of POD, is vulnerable to the charge that these regime types are not being compared on a like-for-like basis. Proponents of WSC could argue that the regime type that they are in favour of has been given an unfair hearing by Rawls and that his preferred alternative is not grounded in any kind of historical reality. His argument in favour of POD is thus based on a flimsy foundation.

Thirdly, I have argued that there can never be a complete description of all of the institutions and policies necessary for a regime type like POD to remain just over time, irrespective of historical contingencies. The point that I made was that using ideal types to think about the



institutions required for a just society cannot account for all of the eventualities that may affect the justness of the basic structure.

Taken together, these three problems show conclusively that using ideal regime types in general, and POD specifically, to argue in favour of a particular set of institutions which are meant to guarantee the justness of the basic structure, is untenable. In the following chapter I discuss an alternative approach to creating and maintaining a just basic structure that is rooted in non-ideal, rather than ideal theory. This alternative approach shows how the right to private property could be justified within the framework of justice as fairness and how questions of distributive justice can be dealt with a way that is not possible if ideal regime types are used to think about justice.

## Chapter 4: Property rights and the basic structure

### Introduction

The debate about the most appropriate property rights regime for a just society has been, for the most part, between those in favour of POD (and thus the private ownership of the means of production and natural resources) and those in favour of liberal socialism (which allows for democratic control over the means of production and natural resources). As we have seen, Rawls favours private property within a POD, but makes it clear that there could be different property arrangements that could meet the requirements of justice as fairness.

There have been several attempts to show that Rawls is wrong to argue that different property rights systems are compatible with justice as fairness. In the first part of this chapter, I investigate three arguments that all try to prove, via different routes, that private property is the *only* property rights regime compatible with justice as fairness.<sup>14</sup> I reject two of these arguments and show that, while there is a measure of support for the third, it is not conclusive.

In the second part of the chapter I argue that the way to approach property rights within the framework of justice as fairness is to show that a particular property rights system, together with the other institutions of the basic structure, work together to maintain background justice. In this section I explore the possibility of justifying a system of private property rights by either having the state act as employer of last resort, or by giving every citizen a so-called ‘stakeholder grant’ or a basic income grant. I argue that the former succeeds while the latter must be rejected. The reason why the right to private property can be justified by having the state act as employer of last resort, is because the institution of private property forms part of a larger group of institutions which, taken together, guarantee the justness of the basic structure.

In the final part of the chapter I use the conclusion about how private property rights can be justified to raise a larger question of how distributive justice is affected by the basic structure. I argue that the way that Rawls deals with the question of distributive justice – by using pure procedural justice – cannot account for the way in which the institutions of the basic structure might need to be altered in order to maintain background justice over time. I argue that pure procedural justice should be replaced by imperfect procedural justice. This will have an effect

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<sup>14</sup> In this case, the focus is less on POD as an ideal type of property regime, and more on arguments that treat *some* kind of private property regime – whether POD or something else – as either a necessary or a sufficient condition for justice as fairness.

on the way we should think about the institutions of the basic structure, particularly property rights.

### **1. Three arguments in favour of private property**

Several theorists have tried to demonstrate that the right to private property can in some way be derived from justice as fairness (e.g. Barros 2009, Shapiro 1995, Gray 1998, Tomasi 2012). In this section I try to show that these attempts cannot succeed for much the same reason that using ideal types to think about justice cannot succeed: none of them takes seriously the fact that the economy of any society is a dynamic force that can cause significant changes over time.

The first argument in favour of private property is based on an appeal to the principle of liberty. It attempts to show that a system of private property rights promotes pluralism and that for this reason there are grounds for arguing that justice as fairness mandates it. Additionally, a system of private property rights solves many difficulties associated with allocating resources and that it can serve as a bulwark against tyranny. I will show that this argument is convincing, but not conclusive. It might well be the case that allowing the private ownership of a range of goods might be one way of dealing with allocation problems but that this is not a sufficient reason for finding in favour of it. I also show why the existence of private property does not necessarily protect a society against tyranny nor is it required to promote pluralism.

The second argument in favour of private property is also based on an appeal to the principle of liberty, but focuses on the rights necessary to develop the two moral powers. In this argument the claim is made that certain economic rights, like the right to private property and commercial speech, should be included as basic rights because they are necessary for pursuing a particular conception of the good and acting from a sense of justice. I show that this argument cannot succeed and that it is not convincing to claim that economic rights, like the right to private property, are necessary for all citizens to exercise their moral powers.

The third argument in favour of private property is based on an appeal to the difference principle. It tries to show that a system that recognises private property rights is likely to create a greater quantity of primary goods than a system that does not do so. If this is the case, then the difference principle would mandate a system of private property ownership. I will argue that there is some support for this view but that the argument is not conclusive. Let us take each of these in turn.

### 1.1 Private property and pluralism

The question of how to allocate resources to different individuals with different conceptions of the good is difficult to answer in a society that does not have some kind of market system or recognise the right to private property over a wide range of goods. Justice as fairness requires that the state be neutral between different permissible conceptions of the good. Given the relative scarcity of resources and the fact that different people want different things, it is difficult to see how the state would make difficult decisions about how to best allocate resources. The right to private property and a relatively free market solves this problem by allowing individuals to trade with one another in pursuit of their own interest.

In order to make the argument that a private property regime supports pluralism by solving the allocation problem we must consider the alternative: distribution by government decree. In such a system resource allocation would depend on the will of the majority, or some form of authority. This means that individuals who want resources to pursue their conception of the good would be dependent on the goodwill of the majority. This dependency would put severe constraints on the pursuits of the individuals because they would be required to conform (at least in part) with the expectations of the authority. This problem is avoided in a system that permits the private ownership of property and free trade. Individuals are free to decide how to allocate their resources in pursuit of their conception of the good.

Proponents of communal property regimes might counter that there are ways in which such a scheme can promote pluralism and protect the autonomy of individuals. For example, the state might guarantee each person an equal share of a bundle of goods, like housing, food etc. Individuals would then be free to do what they liked with those resources. Barros (2009: 53) argues that any such scheme would severely restrict the freedom of individuals because it would put prevents them from making transactions that would make both of them better off. If each person were guaranteed an equal share of a bundle of resources without the right to trade, it would constrain their ability to pursue their conception of the good. For example, some people may value travel and food more highly, while others might prefer housing. By not allowing these individuals to trade with one another, both are being made worse-off than they need to be. A scheme of private property rights and free markets avoids these kinds of problems by coming to an efficient solution without the intervention of the state. This is not to say that the state is completely absent – it maintains the conditions necessary for transactions to take place – but it is not involved in deciding *which* transactions take place.

Another way that the existence of private property could protect pluralism is by serving as a bulwark against an excessive power of the state. In a liberal, pluralistic state where there are competing conceptions of the good, private property can play an important role in providing the space for individuals with very different conceptions of the good to pursue their ends without coming into conflict. It can also serve as a powerful bulwark against the state by delineating a space in which the state may not exercise its power except under extraordinary circumstances. Thus, Barros (2009: 47) argues that private property “promote[s] the ability of individuals to make basic life choices for themselves by creating physical spaces where they can engage in behaviour frowned on by the rest of the community and where they can withdraw if they want to be alone or to interact only with people of their choice”. Private property provides a measure of freedom (for those who possess it) from interference from others. In this role private property plays an important role in protecting liberty.

Milton Friedman and F.A. von Hayek both support private property on the basis that it served as a counterweight to the state and in this way protected liberty (Barros, 2009: 50). In a sense, private property plays a role in maintaining a balance of power between the individual and the state, and thus protects the freedom of the individual from the coercive power of the state.

The argument could be made that a highly uneven distribution of property would give the owners of property significant power over those who are dependent solely on their labour. This reduces, rather than promotes liberty (Clark & Gintins 1978: 95). An alternative arrangement in which the ownership of the means of production is democratically held offers a way for individuals to exercise their basic liberties in concert with others while not being subjected to the potentially harmful owner/employee relationship. The democratic ownership of property might also offer a means by which all individuals can gain some measure of control of the conditions in which they labour (Krouse & McPherson 1986: 120). This argument shows that the existence of private property itself does not necessarily promote liberty. However, as we have seen in the previous section, the argument for the collective democratic ownership of property comes with its own set of problems, especially when it comes to securing the liberty of those with wildly different conceptions of the good. It may well be the case that if the ownership of property in a system that recognises private property were to be concentrated in the hands of a small elite, it would undermine liberty, but this is not a foregone conclusion. Historically, at least in the 20<sup>th</sup> century, nations that experimented with collective property rights have been less respectful of liberty than those with private property rights.

Another way in which private ownership might constrain liberty is due to the way that the owners of capital could control the structure of the economy. I am not here referring to the way that a grossly unequal ownership of capital allows the wealthy to have more influence in swaying public opinion. This issue was already dealt with in the discussion of the shortcomings of WSC in Chapter 2. The issue that I am raising here is related to the way that the ownership of capital affects the structure of the economy and the opportunities that exist within it. The ownership of capital gives the owner the ability to set the goals for a firm and decide on the direction that it will take. If the majority of firms are owned by a small minority of people, it gives these individuals the power to shape the kinds of lives that the rest of the population are able to live. This is similar to what Williamson calls the “structural constraint” (Williamson 2009: 438) that capitalist societies face. The structural constraint refers to the fact that certain policies which might be popular among the electorate, or desirable from the perspective of justice, are not available to policymakers because of their dependence on investment by the owners of capital. For example, new worker protection regulations which would improve the position of the least-advantaged in society (as required by the difference principle) are impossible to pass because of the de facto veto power that the owners of capital have. The owners of capital have this power because they can threaten to withdraw their investment and leave workers even worse off (unemployed) rather than see new regulations passed. This kind of power manifests itself when the ownership of capital is held by a small minority.

It could be argued that if property were widely distributed then the structural constraint problem could be avoided. The argument would be that because there is a wide distribution of ownership, no single group of wealthy capitalists would be able to impose their will on policymakers. If this were the case, then it could be argued that private property promotes liberty and pluralism as long as the distribution of the property remains broad enough. This argument is appealing, but does not hold up to scrutiny because it will require significant restrictions of the individual liberty in order to maintain a relatively equal distribution of ownership. It could be the case that the cost of maintaining a relatively equal distribution of wealth will have a negative effect on pluralism. The reason why this is likely to happen is due to the constraints that the government bureaucracy will need to impose in order to maintain a relatively equal distribution of wealth. Vallier (2014: 292) argues that a large bureaucracy with invasive powers will be required to keep track of the relative position of each person in order to make sure that they do not accumulate more capital than is permitted. This bureaucracy will need the power to intervene in market transactions in order to maintain a relatively equal distribution of wealth.

This intervention is likely not only to cause enormous economic inefficiency, but also to have a negative effect on pluralism. Those who wish to alienate their property in ways that will lead to a more unequal distribution of ownership will have to be stopped by the state to prevent this from happening.

To illustrate why the vast bureaucracy necessary to maintain a relatively equal distribution of wealth would narrow the range of conceptions of the good that would be possible in a given state, consider the following example. Mary, Bob and Sue all own approximately equal shares of capital. Mary decides that industrial production is harmful to the environment and decides to sell her capital to Sue and donate the money from the sale to a charity that protects pandas. She continues to work, but has alienated all of her capital. Bob is interested in becoming an entrepreneur and decides to sell the capital that he owns to Sue and to invest the money from the sale in his own business in the hope of generating a higher return. He starts an internet business but it fails after a few months, leaving him with outstanding debts. Meanwhile, Sue has accumulated the capital of both Bob and Mary and is generating a moderate return from it. She is now three times wealthier than what she, Bob and Mary were before the transactions took place, but is now far wealthier than either Bob or Mary. The only way in which this state of affairs could have been prevented would have been if the state had either prevented Bob and Mary from alienating their capital or if the state had allowed them to alienate their capital, but only allowed them to reinvest the proceeds of the sale in ventures that would lead to a relatively equal distribution of wealth being maintained. This simple example illustrates the extraordinary difficulties that would be faced by a private property rights system that tried to maintain relatively equal levels of ownership over time.

The issues raised by trying to maintain relatively equal ownership while at the same time having a system of private property rights are similar to the issues that were discussed in the previous chapter when the arguments of Freeman (2013) and Williamson (2009) were evaluated. Freeman (2013: 31-34) argues that the only way to maintain a broadly egalitarian distribution of wealth was to amend FEO, while Williamson (2009: 446-447) argues that socialist policies would be needed to achieve the same end. In this section my main aim has been to show that the cost of maintaining a relatively equal distribution of wealth in a system that recognises private property would have to come at the cost of restricting pluralism. The state would have to act to prevent some individuals from pursuing certain conceptions of the good because the result of not doing so would lead to an unequal distribution of wealth from arising.

## *1.2 Economic rights as basic rights*

Another way of connecting pluralism with the right to private property is to show that the right to free exchange is intimately linked to the right of free speech, which is one of the basic liberties protected by the first principle. The ability to communicate freely with one another about the exchange value of various goods and services allows citizens to effectively pursue their conception of the good or revise it in light of new information. It is for this reason that Shapiro argues that commercial speech (e.g. advertising) should fall under the same category as non-commercial speech, i.e. free speech in the sense that Rawls uses it (Shapiro 1991: 50-51). Shapiro argues that both types of speech are necessary for the individual to exercise their two moral powers – the capacity to act from justice and the capacity for formulate and pursue a conception of the good. It seems obvious that in order to pursue a particular conception of the good, an individual will need to communicate what it is that they are aiming for and (usually) request the help of others in striving toward it. Most conceptions of the good require that an individual interact with others in some form and they will require the use of some resources. To do this they will need to enter a market of some kind to obtain what they require. To prevent commercial speech would be to prevent people for communicating to one another what they require in their pursuit of the good. To prevent commercial speech in the form of advertising would be to severely limit the ways in which individuals could exercise their two moral powers.

This kind of communication is exactly the kind necessary for individuals to “revise and rationally to pursue what one views as worthwhile in human life” (Rawls 2001: 169) It is difficult to see how this could be possible in a society in which the commercial speech, such as advertising or indications about the availability of various resources, was restricted. Without an idea about the resources available in society and what they cost and have some knowledge about the value that others put on them, it is difficult to see how an individual could make a rational decision about how to revise the ends that they are pursuing.

Building on the right to commercial speech, Shapiro (1995: 58) tries to show that an argument for the right to private property can follow along similar lines to the argument in favour of free exchange. His claim is that Rawls is mistaken to argue that justice as fairness is neutral with regard to the institutions that determine how property is owned on the basis that the right to private property provides a greater variety of permissible conceptions of the good to flourish within society. What Shapiro argues is that the existence of private property would allow more room for different, competing but reasonable conceptions of the good to exist (Shapiro 1995:



64). His point is that the existence of private property is necessary for a range of comprehensive, reasonable doctrines but that the existence of the right to private property does not exclude those doctrines which do not place any value on private property (for example the desire to labour with others as a member of a cooperative on the basis of equality). In other words, the existence of private property permits a broader range of reasonable doctrines to flourish than would be possible in a system in which it does not exist.

If the existence of private property rights allows a broader range of reasonable comprehensive doctrines to exist, then it would seem that the right to private property should form part of a liberal conception of justice and must therefore be included as a basic right. Overlapping consensus holds when “reasonable doctrines endorse a liberal political conception of justice, each from its own point of view and for its own comprehensive reasons” (Freeman 2007: 476). The greater the number of different reasonable conceptions of the good that can be pursued under the set of institutions that constitute the basic structure of society, the more stable the overlapping consensus about the political conception of justice is likely to be (Shapiro 1995: 68). In this regard, the argument for the right to private property is actually an argument for providing the means to achieve a more stable overlapping consensus.

Shapiro’s argument rests on the assumption that the right to private property allows for a greater variety of different, permissible conceptions of the good to flourish. The basis for his argument is that collective ownership would necessarily be restrictive because the will of the majority would determine how capital would be allocated. This would restrict the number of different conceptions that could be pursued because those whose views differed markedly from the majority would not be able to gain access to the resources necessary for them to pursue their conception of the good. The right to private property prevents this from happening and allows different groups of people to pursue their conception of the good with minimal reliance or interference from the state.

Consider the way in which the right to private property allows those whose conception of the good is to labour along with others on a basis of equality to co-exist peacefully with those whose conceptions are more individualistic and that require that one can be one’s own boss. To ‘live out’ these particular conceptions of the good means actually being able to do the things that one has reason to value. For example, the communitarian who is a member of a cooperative must actually be able to make collective economic decisions with others while the

individualists who wants to be their own boss must be able to make decisions about how they want to run their businesses.

A system with private property rights allows for the existence of both cooperatives as well as individually owned businesses, while a system in which private property does not exist by definition prevents anyone from owning a private business. On this basis it seems that a society in which the ownership of private property is permitted will provide more support for the overlapping consensus required to support justice as fairness. The right to private property should therefore be a basic right because it protects a wider variety of legitimate conceptions of the good than does a system in which the right to private property does not exist. Tomasi takes a similar approach by arguing that economic rights should be included as basic rights because they are essential to the development of the two moral powers (Tomasi 2012: 121). Tomasi claims that “the exercise of thick private economic liberty is for many citizens a condition of responsible self-authorship” (Tomasi 2012: 183) and that without these rights the autonomy of the individual would be unjustifiably restricted.

However, the argument that private property should be included as a basic right because it allows for a broader overlapping consensus to take hold is not entirely convincing. For a right to be considered basic, in the sense that Rawls uses the term, it must be “essential for the ideal of citizens as free and equal persons” (Audard 2007: 95). Rawls makes it clear that “the right to own certain kinds of property, (e.g. means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the first principle” (Rawls 1999: 54). The rights that Rawls (1999: 53) puts forward as being basic are:

1. Political liberty (the right to vote and hold office)
2. Freedom of speech and assembly
3. Liberty of conscience and freedom of thought
4. Freedom of the person, which includes freedom from psychological oppression and physical assault and dismemberment (integrity of the person)
5. The right to hold personal property
6. Freedom from arbitrary arrest and seizure as defined by the concept of the rule of law

Each of these basic liberties are to be held equally and can “be limited and compromised only when they conflict with other basic liberties” (Rawls 1999: 54). What this means is that a basic liberty can only be restricted if they come into conflict with one another. For example, the right

to freedom of speech and assembly may only be limited in order to protect the freedom of the person and to prevent psychological oppression.

It may be argued that Rawls was simply wrong not to include economic liberties as part of the basic liberties. Tomasi (2012) and Shapiro's (1995) arguments make this point by trying to show that economic rights are necessary for citizens to develop their moral powers. However, it does not seem at all clear that this need be the case. In modern societies many citizens are not owners of capital but this does not diminish their ability to exercise their moral powers. If the claim is that the mere *opportunity* to exercise these economic rights is enough, then it raises the question why it is necessary to make these rights basic (Freeman 2014). Basic rights can only be restricted if they come into conflict with one another. This means that if economic rights, like the right to private property, were made basic, then it would be possible to restrict them only if they directly conflicted with the other basic rights. If this were the case it is difficult to see how the state could collect taxes to fund the social minimum or to promote FEO. The basic liberties are lexically prior to the requirements of the second principle, meaning that there can be no trade-offs between the two. If economic liberties, like the right to private property, were basic, there would be no basis for the state to infringe on those rights. Taxes are effectively an infringement of property rights. If economic rights are basic liberties, then they would be impossible to tax unless it was required to protect the other basic liberties. The argument might then be made that taxes could be justified on the grounds that the administration of the rule of law needs to be funded. However, this would justify nothing more than a minimal night-watchman state.

The above-mentioned problems with the assumption that private property protects pluralism and basic rights begin to point us in the direction that we should be taking when thinking about private property rights. It should be clear by now that the fact that private property is compatible with, or promotes some aspect of, justice as fairness is not sufficient for mandating it is a basic right. The most we can say is that the private ownership of the means of production and natural resources might promote pluralism, but whether it does or not, depends on the other institutions that make up the basic structure of society. In the following section I consider another failed argument that tries to show that private property rights are mandated by justice as fairness. The purpose of working through these arguments is to pave the way for an alternative approach to private property rights that is not subject to the same kinds of criticisms.

### *1.3 Private property and the difference principle*

Another argument that is commonly made in favour of private property is that it is in the long-term best interests of everyone in society. Locke makes use of this type of argument to try and justify why unequal property ownership is better than no property ownership at all. When Locke argues that “a King in a large and fruitful Territory [without private property or money] feeds, lodges, and is clad worse than a day Labourer in England,” (1690 [1980]: 26) he is appealing to the idea that there is a link between the establishment of private property and production. This is a form of rational choice argument: if the existence of private property makes the average person living in such a regime better off than the best-off person living in a state without private property, then it seems that there can be no grounds for preferring a system without private property.

It is possible to adapt this argument to make it compatible with the difference principle. If it can be shown that a system of private property rights is better able to meet the requirements of the difference principle than the most promising alternative, then there are good grounds for endorsing it. This would mean that there is no need for the ideal legislators in the legislative stage to consider the historical traditions and circumstances of their society in order to make a decision about the most appropriate scheme of property rights.

Gray (1998: 45-47) makes an argument along these lines by contrasting a system of private property with a system that permits only collective ownership. His claim is that any economic system that recognises private property rights has historically outperformed (at least in economic terms) regimes that do not do so. The claim then is that because regimes that recognise private property rights have significantly higher growth rates there are good grounds to prefer this system of ownership over collective ownership based on the requirements of the difference principle. The difference principle requires that the economic institutions be structured in such a way as to maximise the position of the least-advantaged. Income and wealth are part of the index of primary goods, therefore if it can be shown that a particular property rights regime delivers greater income and wealth to the least-advantaged, it is to be preferred to any other alternative, all other things being equal.

The argument that Gray puts forward in favour of private property rights begins by illustrating some of the problems associated with Rawls’s socialist incarnation of justice as fairness, (liberal) market socialism. Market socialism is a system in which the means of production is held collectively, but where competitive markets are allowed to set the price. The state owns

capital and leases it to groups of workers (or their representatives), with supply and demand determining price. In this way the factors of production (land, capital, labour) are distributed according to demand. The market is used to determine the efficient allocation of the means of production. Gray argues that it may be possible to combine markets with collective ownership but that any system not employing some form of private property would face problems in making rational economic calculations about the allocation of capital (Gray, 1998: 45). He claims that these problems are so grave that they would lead economic growth to be substantially lower in socialist societies when compared to those permitting the private ownership of property.

Consider the following sketch of a market socialist system, based on Shapiro's description (Shapiro 1995: 8). Individual property ownership is not permitted and all capital must be held collectively at the level of the firm. Workers hold capital through their membership of the firm that they work at and are not allowed to alienate it (if they were, it is likely that capitalist firms would emerge). Decisions about the allocation of capital, the hiring of new employees and the appropriate level of production are made by the management of the firm. Management is selected on a democratic basis by the members of the firm. Workers not only earn a salary, but are also remunerated by a profit sharing scheme in the firm.

To see how rational economic calculation would be severely constrained in such circumstances, consider how a firm would make a decision to expand production. Expanded production would require either more capital, or more labour, or both. For a firm operating under a market socialist regime, both of these requirements give rise to problems. If more labourers are taken on, it would mean that the existing employees could potentially see their income drop because they now need to share the profit that the firm makes with a greater number of fellow workers. The expansion of the labour force might lead to greater production and sales, but ultimately generate a lower return to each individual worker because their share of the capital has been reduced by the arrival of new workers. This means that firms would be very hesitant to take on more labour unless they were absolutely sure that the returns on their watered-down shares would not be offset by higher labour costs and the requirement to share in the profit. It might be argued that the owners of a capitalist enterprise face similar problems when deciding whether or not to expand, but the difference here is that the owners of capital can make the decision on their own and relatively quickly, whereas a market socialist firm must deal with significant internal political pressure.

The alternative to adding more workers is to add more capital in order to increase production, but this also leads to major problems. In a market socialist system the only way to get more capital would be to apply to a state bank. Assuming that there is more than one state bank (which makes sense in a market socialist system) it seems at first glance that applying for a loan would work in much the same way as in a capitalist system. However, there is one difference that will have a significant effect on the way that banks operate. Even in a market socialist economy where there is more than one bank, the management of the bank will be in the hands of people selected by the state. In other words, they will be political appointees. The basis on which they will make capital available would be strongly influenced by their position as a political appointee. The firms most likely to get loans would be those who are able, through their members, to influence the political sphere and exert pressure on the managers of state banks to extend credit to them, rather than to smaller, but possibly more promising, rivals (ibid. 46).

A counter-argument to this would be that the problem of capital allocation could be solved by forcing banks to adhere to a strict rules-based approach when making decisions about loans. This type of rule-based decision making is already widely used when determining the eligibility of individuals applying for a mortgage. Many banks use an algorithm that takes a number of variables into account and then gives a recommendation about whether the bank should make the loan or not. It is entirely conceivable that this process could be wholly automated and that human decision-making could be removed entirely. While this might be possible for relatively simple procedures like home loans, it is unlikely that any algorithm would ever be able to deal with the complexity of decisions involving the financing of complex business expansions, nor would it be able to make decisions about whether to finance a new enterprise for a product that does not yet have a market.

The difficulties in deciding about whether to expand production would undoubtedly affect the overall productivity of the economy. Risk-taking would be greatly reduced and innovation would take place at a slower pace. Over time reduced economic growth will have far-reaching effects on the well-being of all of the participants in the economy. Lower wages and productivity will lead to a lower standard of living for the citizens of a market socialist state. If a socialist state offers less of the primary goods of income and wealth than does an alternative capitalist state, then, based on the difference principle, there are good grounds to reject the socialist system in favour of one that permits private ownership.

Gray's argument in favour of private property based on the difference principle highlights some of the difficulties that would be faced by a market socialist system, but the argument does not show that justice as fairness requires a private property system. The argument that the economic performance in a system that recognises private property rights will automatically leave the worst off better off than a market socialist system, and that the difference principle therefore requires that private property be permitted, is not entirely convincing. This claim relies on the position of the least-advantaged being judged on the basis of their income and wealth, and does not take into account the social bases of self-respect. It may well be that a system of private ownership results in a greater level of material wealth for everyone, and even makes the least-advantaged materially better off than they would be under an alternative system, but this is not sufficient to find in favour of private property. To use the difference principle to try and justify private property requires that the least advantaged receive more primary goods than they would under an alternative scheme, which includes the primary good of self-respect. It is not clear that a convincing argument could be made that it is necessarily the case that the least-advantaged citizens of a state that recognises the right to private property will necessarily be better off than the least-advantaged citizens of a state that uses some form of collective ownership.

Furthermore, Gray admits that his argument does not show that some form of collective ownership is unjust, only that "private property in the means of production is collectively prudent" (ibid. 48). It might be the case, (though it is difficult to see how) that a set of institutions associated with socialism could offer comparable economic performance. For this reason, and because of the difficulties in determining to what extent the private ownership of the means of production might affect the self-respect of workers, I conclude that the recognition of private ownership of the means of production and natural resources is neither necessary nor sufficient for the realisation of the difference principle.

## **2. Justifying property rights as part of a larger scheme of institutions**

In this section I explore an alternative approach to justifying the right to private property. My approach is based on Rawls's explanation of the way in which institutions are to be judged from the perspective of justice. In his discussion of the role institutions play in securing background justice over time, Rawls argues that "single rules and institutions are not by themselves sufficiently important but [...] within the structure of an institution or social system one apparent injustice compensates for another" (Rawls 1999: 50). In other words, institutions



cannot be judged individually, but must be evaluated within a broader system of interlocking institutions. The aim here is not to show that the right to private ownership of some kinds of property is justified as a right that exists outside of the conception of justice as fairness, but rather to show in what form it could be compatible with justice as fairness. In other words, I will argue that a system of rules which allows the private ownership of some types of goods is justified provided it forms part of a collection of other institutions which, working together, meet the requirements of justice as fairness.

There are several sets of institutions that, working together, could be used to justify some form of private property that meets the requirements of justice as fairness. In the following section I discuss two combinations of institutions and policies, suggested by Brettscheinder (2012: 64-68) and O'Neill (2009: 437-447) that attempt to do this. The first argument tries to justify the right to private property by having the state act as employer of last resort. The second attempts to justify the right to private property by having the state grant every citizen a share of productive resources or by providing them with an unconditionally allocated income stream. Both of these arguments show that the right to private property can only be justified if it forms part of a larger system of interlocking institutions that, working together, guarantee the justness of the basic structure. The aim here is to show that if a particular society that aims at justice as fairness wishes to recognise the right to private property, measures must be in place that will protect the justness of the basic structure.

Both of the arguments that I evaluate in the following section try and do this by suggesting how the right to private property needs to fit into a larger set of institutions. I will argue that in terms of justice as fairness, the only acceptable route to take is to have the state act as employer of last resort. I will argue that the objections to this approach can be overcome, while the objections against having the state provide everyone with a basic income grant or a stakeholder grant, cannot be overcome within the framework set out by justice as fairness.

### *2.1 The right to employment*

The first argument that tries to justify the right to private property as part of a larger set of interlocking institutions asks that the state act as employer of last resort for all those seeking work but unable to find it in the private sector. This approach tries to show that the right to private property is one economic right among several others that the state must provide. The justness of the right to private property is determined in part by the relation between it and the other rights, for example the right to employment. This is an approach that finds support within



Rawls's own work, although he does not use it as a way of justifying the right to private property. Rawls argues that the state must act as an employer of last resort because without "a sense of long-term security and the opportunity for meaningful work and occupation" (Rawls 2005: lxi) citizens will lose their sense of self-respect and no longer see themselves as cooperating members of society, but rather as objects of charity. This is similar to the reasoning that Brettschneider gives when arguing that the existence of the right to private property must offer something to those who are excluded by this right (Brettschneider 2012: 65). Brettschneider argues that the right to private property entails that the state must use its coercive power to enforce the rights of the private owners against those who are without property. In order to justify this use of force, the state must offer those who are without property something which compensates them for not having access to the property that is protected by the state. In effect, this is a type of compensation received by those who are without property in order to respect the rights of those who have property. Rousseau uses this approach in his discussion of property rights and it fits well within Rawls's contractualist approach:

Regardless of the light in which [the rich] tried to place their usurpation, they knew full well that they were established on nothing but a precarious and abusive right, and that having been acquired merely by force, force might take them away from them without their having any reason to complain. Even those enriched exclusively by industry could hardly base their property on better claims. They could very well say: "I am the one who build that wall; I have earned this land with my labour." In response to them it could be said: "Who gave you the boundary lines? By what right do you claim to exact payment at our expense for about we did not impose upon you? Are you unaware that a multitude of your brothers perish or suffer from need of what you have in excess, and that you needed explicit and unanimous consent from the human race for you to help yourself to anything from the common subsistence that went beyond your own?" (Rousseau, 1754 [1987]: 78)

Rousseau's approach makes it seem as though the owners of property need to pay a type of ransom to those who do not have property in order to hold onto their property rights. However, the view that those who are without property are owed something by those who do, is incorrect. A better way to interpret this approach is to view it as part of the agreement that would be reached behind a partially lifted veil of ignorance.

The partially lifted veil of ignorance gives individuals virtually complete information about the society they live in, but leaves them ignorant about the position that they will occupy. It is at this stage that the legislation that is meant to give effect to the two principles of justice must be decided upon. The individuals behind this partially lifted veil of ignorance will need to decide which measures to put in place to ensure that the least-advantaged group in this society is as well off as possible, provided that they are willing to engage in social cooperation. One such measure might well be that they should be guaranteed some form of employment should they want it. This is especially true in a system that allows for the broad private ownership of the means of production and natural resources. The only rational choice for those behind the veil of ignorance would be to insist that the state provide them with employment that generates a return on their labour that is at least equivalent to what the least-advantaged person could generate if the resources were collectively owned. If it were possible for the least-advantaged to secure a greater share of primary goods under a system that does not allow for the private ownership of resources then there would not be any reason for the least-advantaged to support a system of private property rights.

The claim being made here is that the right to private ownership is legitimised by the state acting as employer of last resort. The power that the state has to use its coercive powers to enforce the exclusion rights of those who hold private property against those who do not is justified only if i) the least-advantaged have access to a larger quantity of primary social goods under a system of private property rights than they would have under an alternative system and; ii) that the access that the least-advantaged have to these goods is regulated by the notion of reciprocity and is not damaging to their self-respect.

This approach is consistent with the reasoning that Rawls suggests would take place behind the veil of ignorance in which the least-advantaged effectively have a veto over any decision other than a completely equal division of all rights and advantages (Rawls 2009: 113). This argument bears a strong resemblance to the argument, discussed in the previous section, that the difference principle mandates the right to own private property. The difference here is that the state explicitly protects the autonomy of the least-advantaged and guarantees them the opportunity to take part in social cooperation.

However, there are at least four problems with having the state act as employer of last resort. The first is that it may cause significant economic inefficiency. If the state provided jobs to all those who wanted them it would crowd out private investment in the enterprises that would

provide the services that the state is now offering. The specifics of the scheme in place to manage the work that the state allocates to those who turn to it as employer of last resort will have consequences for the rest of the economy. Firms that provide services that employ low-skilled workers (e.g. rubbish collection, roadworks, etc.) will be forced out of business by the state if it can provide those same services at a lower cost. This will have the effect of putting even more people out of work, which then requires that the state employ even more people. My view is that this is not likely to be a significant problem in a state that promotes FEO. The opportunity to receive training paid for by the state will make it unlikely that there will ever be a very large portion of the population that turns to the state as employer of last resort. Furthermore, there are likely to be reasons why individual would prefer working in private firms. One of these is the opportunity for advancement and the chance to work on varied projects, neither of which are likely to be offered by state employment.

There are also bound to be difficulties in deciding what the minimum level of competence and physical ability would have to be in order to qualify for state sponsored work. This leads to the second problem: if the state is to act as employer of last resort that is meant to provide the meaningful occupation that promotes the self-respect of citizens, then the kind of work that it provides cannot be ‘make-believe’ work intended only to occupy the time of those employed (Hsieh 2009: 403). This kind of ‘work’ would no doubt be damaging to the self-respect of those employed in this way and would lead their fellow citizens to look down on them with contempt. It is difficult to see how this problem could be avoided, particularly in a world where the demand for the low-skilled labour is decreasing.

To avoid this problem, the state would have to provide work that is not damaging to the self-respect of those that it employs. For Rawls self-respect includes two components: the first requires that one must have a sense of one’s own worth in the pursuit of a particular conception of the good and second; one must have the confidence to advance one’s own ends (Freeman 2007: 428). If the state could provide work that does not do damage to either of those two components, then the problem of damaging the self-respect of those who turn to the state as an employer can be avoided. There are at least two ways in which the state can do this. Firstly, it can give workers a degree of control over how they accomplish the tasks required of them. In other words, it can give them a sense of agency and provide them with work that is socially necessary (Hsieh 2009: 446). Secondly, the state can impose working hours which give workers ample opportunity to pursue their conception of the good. This means that workers will not rely primarily on their position at work for their sense of self-respect. Instead, they will engage

in other activities with others where they have very different roles to those that they have at work.

There is a third problem with the state acting as employer of last resort: Rawls's commitment to a 'thin' theory of the good means that the state cannot employ people to do the kinds of things that would fall under more comprehensive conceptions of the good, nor can it use some form of income supplement to encourage the private sector to employ more people in specific areas. The requirement that the state not favour any particular conception of the good puts severe limits on what the state can actually do with the labour of those who are employed. It can only provide the kinds of goods and services that can be thought of as primary goods that are useful to all, irrespective of their conception of the good. For example, the state can use those who turn to it as an employer of last resort to work on projects that safeguard the environment. This type of work provides benefits which are available to all. It cannot provide work that favours one permissible conception of the good over another.

This problem can be overcome by identifying a range of projects and types of employment that do not promote a particular conception of the good. As mentioned in the previous paragraph this will include work that aims to safeguard the environment, or combat global warming. Other types of work that are carried out by the state, like administering justice or issuing permits and licenses might also be available. There are likely to be practical difficulties in dealing with this issue, but they are not, in principle, insurmountable.

The final problem with the state acting as employer of last resort is that it is likely that those most in need of employment will also be those without the skills necessary to succeed in the technological society we live in today. It may be argued that fair equality of opportunity mandates that all those who need further training to take part in the economy are entitled to state support. However, it might still be the case that a sizable number of people will effectively be unemployable in the future. No amount of training will make them viable employees in the private sector. How the state is meant to treat these citizens is a difficult question. Rawls says that even under ideal circumstances it might be possible that something like this could happen, but that this would be due to "social conditions we do not know how to change, or perhaps cannot even identify or understand" (Rawls 2001: 140).

## *2.2 Unconditionally allocated property rights*

Another way of justifying the existence of private property as part of a larger set of institutions would be to ensure that there are measures in place to make sure that no one is excluded from

holding property. In other words, policies must be in place that make sure that everyone has private property rights. What makes private property just according to this approach, is that every citizen is entitled to at least some private property. This type of approach is mentioned by Williamson (2009: 440-444) in his discussion of POD. Rawls argues that in a POD, property (understood as productive capital) is widely, but not necessarily equally held. He argues that it is reasonable to adopt this view and to argue that while property need not be equally distributed, it must be distributed among everyone.

In order to achieve the aim of giving every citizen productive wealth, Williamson suggests that property rights and tax policy must be structured in such a way as to give every citizen a substantial stake in the society in which they live. Looking at the United States, Williamson argues that it would not be unreasonable for each household to hold at least \$100 000 in assets. The assets held by the households of the least-advantaged group would be diversified to include the ownership of stocks as well as residential property and other asset classes. Williamson argues that this distribution of wealth could be achieved by a number of means. One way would be similar to Ackerman's stakeholder scheme in which each citizen receives a grant at the age of 21 that allows them to invest in a number of assets as well as their own education (Ackerman 2003). This grant immediately gives each adult a stake in their society. The other option would be to make use of a universal basic income such as proposed by Van Parijs (1991; 1995). Such a scheme would provide each person with some income irrespective of whether they chose to work or not. These two suggestions are similar; the stakeholder society grant would effectively become a universal basic income if invested in interest-bearing assets<sup>15</sup>.

However, from the perspective of justice as fairness, there are at least two major problems with both the stakeholder scheme and the universal basic income grant. Firstly, the proposals do not meet the requirement of reciprocity. Citizens who do not work (but are able to), cannot expect those who do contribute to social cooperation to share the benefits of their cooperation. Reciprocity is not met when the state simply gives each citizen a grant. If there is no responsibility on the part of the receiver to use the grant in ways that are socially productive,

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<sup>15</sup> At this point it may be asked whether a line of reasoning similar to Dworkin's (1981, 2000) Resource Egalitarianism might be used here. Dworkin's main claim is that people should be compensated for the effects of brute luck, but not for the results of their free choices. In other words, social justice requires that benefits and burdens that are the result of brute luck (for example, genetic endowments) be distributed equally, while the rewards and consequences of freely chosen actions must fall on those who are responsible for the choices. In terms of Dworkin's theory, individuals are entitled to whatever they have once they contributed the taxes necessary for maintaining justice (i.e. the costs of neutralising brute luck). However, Rawls rejects this approach because it ignores the requirements of the difference principle and the fact that the terms of social cooperation need to be fair (Freeman 2001: 49-50).

then there can be no basis for the state to give the money away. In effect, the state would be giving them the means to pursue their conception of the good, without requiring anything on the part of those receiving the grant. To do this would mean that the state must tax those who pursue their conceptions of the good that involve them being active in productive labour, in order to finance the conceptions of the good of those who do not engage in productive labour. This violates the requirement that the state be neutral with regard to conceptions of the good. To illustrate this point, consider the following example: Peter receives his grant and decides to become a painter of abstract art that will never attract any buyers. Paul also receives a grant, but decides to invest it in his education. He becomes a successful accountant and the tax revenues he generates helps to fund the grants of the next generation. In the meantime, Peter has not made a single sale, and is in fact uninterested in any commercial dealings. He has not contributed to government revenue at all.

The example shows that any kind of grant, or basic income violates the requirements of reciprocity and neutrality with regards to conceptions of the good. However, there may be some room for manoeuvre for those who argue in favour of a basic income grant or some other form of grant. Rawls admits that his index of primary goods does not include leisure and that it is possible to reform it to take leisure into account (Rawls 2001: 179). He argues that a certain amount of leisure time every day (for example, 16 hours) could be included in the index and that it is something like income and wealth which must be distributed according to the difference principle. However, even if leisure time were included in the index of primary goods, there would still be no reason for it to be distributed to those who refuse to take part in social cooperation.

My argument against stakeholder grants and basic income grants is that there doesn't seem to be any way in which they can be made compatible with the requirements of justice as fairness. There may be other reasons for giving people basic income grants, for example, as a way of securing their autonomy, but these kinds of reasons fall outside the scope of justice as fairness. An argument used to justify the right to private property that is compatible with justice as fairness must also take into account the reasoning behind this conception of justice: that the aim of the principles of justice is to specify the fair terms of cooperation among citizens. Rawls makes it clear that we cannot judge institutions independently of the larger system that they form a part of, but it does not seem reasonable to expect that the institution of private property together with stakeholder grants or a guaranteed basic income would meet the requirements of justice as fairness. These justifications for private property completely ignore the idea of

reciprocity and as such must be rejected. Reciprocity requires that “each person engaged in cooperation should not simply benefit (mutual advantage), but should benefit on terms that are fair” (Freeman 2009: 481). Simply giving people a stakeholder grant or an unconditional basic income ignores this requirement.

In justice as fairness, reciprocity is one of the essential features of social cooperation, and requires that “all who do their part as the recognised rules require are to benefit as specified by a public and agreed-upon standard” (Rawls 2001: 6). The terms which govern social cooperation are “terms each participant may reasonably accept, and sometimes should accept, provided that everyone else likewise accepts them” (Rawls 2001: 6). It is difficult to see how giving everyone a basic income grant or a stakeholder grant would meet the terms of cooperation. It would be unreasonable for citizens to accept the terms for an unconditional basic income because the only way that it could be financed would be if some individuals produced more than they were receiving. Those who produced more than they receive would be forced to contribute their additional production in order to finance the basic income of those who do not produce any surplus. The terms of cooperation would then no longer be cooperative because those who only receive, but do not produce would be taking from those who do produce without reciprocating in any manner. Those who do produce would therefore have no obligation to share their surplus with those who do not produce anything.

It may be argued that this line of reasoning would also prohibit the state from offering opportunities for education, or housing, or other assistance to those who do not have the means to pay for it. There are two components to answering this objection. With regard to education, it may be argued that offering education to everyone who wants it falls under fair equality of opportunity. There is a requirement on the part of the state to provide similarly talented and motivated individuals with roughly similar chances for educational attainment. Providing medical assistance to those who cannot afford it (and do not seem likely to ever have the means of paying for it) is something that is justified by a broader understanding of primary social goods. In *A Restatement* Rawls argues that we must assume that “citizens are normally cooperating members of society over a complete life” (Rawls 2001: 171) and that the difference principle requires that the least-advantaged have the means to function as cooperating members over the course of their lives. This means that the share of primary goods going to them must include state funded healthcare as a proxy for income and wealth. This means that the state is justified in giving essential medical care to the least-advantaged, even if they could not afford to pay for the insurance themselves.



Of the two alternatives considered in this section, the proposal that the state act as employer of last resort provides better grounds for justifying the right to private property than does the unconditional allocation of capital or the right to a basic income. It seems reasonable to think that ideal legislators behind the partially lifted veil of ignorance could settle on this proposal. There will undoubtedly be difficulties in deciding on the type of work that the state will offer as employer of last resort.

Now that I have established that the right to employment would make it justifiable for the state to enforce the right of exclusion on the part of owners against non-owners we are in a position to discuss in more detail the status of private property rights. I do not claim to have settled the debate between private property rights and collective property rights – all that I am claiming is that there would be good grounds for allowing the private ownership of a range of goods if the state offered employment to all those who desired it.

### **3. Property rights and the basic structure**

In the previous section, I have argued that the existence of private property is compatible with justice as fairness if the state acts as employer of last resort. In my argument I have not specified the range of goods or resources over which private ownership should be permitted, nor have I said anything about the ancillary rules that would regulate private ownership (e.g. taxes, laws of transfer, etc.). In what follows, I address both of these questions.

The argument picks up from the discussion in Chapter 3 about the shortcomings of using ideal regime types to think about institutions required for a just basic structure. I begin by discussing Rawls's own view about how property rights and ancillary rules governing their use should be regulated by the basic structure. As will become clear, there is an important problem with Rawls's argument in this regard: he does not take into account the ways in which different types of property, as well changing circumstances, affect the justness of the basic structure. In the third and final part of this chapter, I show why any account of the relationship between property rights and justice as fairness should take these circumstances into account. This has implications for how we think about ideal theory as well as pure procedural justice. In the concluding remarks to this chapter, I offer a few remarks in that direction.

To discuss how primary goods are to be distributed among citizens Rawls divides the functions of the state into four branches with different, wide-ranging powers. The four branches that



Rawls discusses are: the allocation branch, the stabilisation branch, the transfer branch and the distribution branch (Rawls 1999: 243-246).<sup>16</sup> Each branch has several functions:

Allocation branch: the aim of this branch is to prevent monopolies from forming and stops firms from exercising undue market power. It is also responsible for levying taxes of various sorts and for making changes to the property rights system if required so that the market more accurately reflects the social costs associated with various activities.

Stabilization branch: the aim of this branch deals with fiscal and monetary policy and is meant to promote full employment and promote access to a broad range of occupations.

Transfer branch: the aim of this branch is to administer transfer taxes that reduce inequality and provide the funds for bringing those below the social minimum up to an acceptable level

Distributions branch: the aim of this branch is twofold. In the first place it is responsible for levying taxes and altering property rights to protect the fair value of the political liberties. The other function of this branch is to make funds available to finance policies that aim at the public good and promote fair equality of opportunity.

The two branches that are of interest for our discussion of property rights are the allocation and distribution branches. It is worth taking a closer look at the powers granted by the allocation branch to understand how this might affect the property rights regime of a particular society:

The allocation branch ... is to keep the price system workably competitive and to prevent the formation of unreasonable market power. Such power does not exist as long as markets cannot be made more competitive consistent with the requirements of efficiency and the facts of geography and the preferences of households. The allocation branch is also charged with identifying and correcting, say by suitable taxes and subsidies and by changes in property rights, the more obvious departures from efficiency caused by the failure of prices to measure accurately social benefits and costs. To this end, suitable

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<sup>16</sup> These branches do not correspond to the legislature, the executive and the legislature. They can rather be thought of as theoretical tools that explain the mechanisms which allows the state to bring a society closer to meeting the requirements of justice as fairness.

taxes and subsidies may be used, or the *scope and definition of property rights may be revised*. (Rawls 1999: 244; emphasis added)

This grants an extraordinary amount of power to the state, but Rawls does not stop there. He also gives the distribution branch the power to “preserve an approximate justice in distributive shares by means of taxation and the necessary adjustments in the rights of property” (Rawls 1999: 245). This means that the specifics of the property rights regime of a society can be altered if the state decides to do so. My aim in this section is to show how, in a system that recognises private property rights, the state can change the status of those rights in a way that conforms with the requirements of justice as fairness.

Waldron’s (1992) now famous argument on supersession offers an explanation of why the demands of justice must be sensitive to circumstances and how this affects property rights. Alchian and Demsetz (1973), on the other hand, deals with the issue of how changes in property rights can more closely align the social costs of using resources with the private gain that those resources make possible. The aim here is to show that deciding on the just property rights regime cannot be taken at the level of ideal theory, but must take into account existing social conditions and, given these conditions, the likely effects of a particular property rights regime on the justness of the basic structure.

Waldron’s argument against inalienable property rights forms the basis for my own argument that justice as fairness might require the state to alter the status of property rights from time to time, and that this precludes any ideal type of property regime being adopted beforehand. Waldron begins his argument with a hypothetical situation which plays out on an arid savannah (Waldron 1992: 24). He asks us to imagine a situation where different tribes each have their own waterhole, with each waterhole having more than enough water for the needs of the tribe. It is assumed that the tribes established their ownership rights over the waterholes on a legitimate basis. Waldron argues that in these circumstances, each tribe has the right to exclusive use of their water hole. They would be entitled to prevent members from another tribe from making use of their waterhole. In these circumstances we may say that each tribe is entitled to their ownership rights over their waterhole. Waldron then asks us to imagine that circumstances change due to some unforeseeable natural disaster, which leads to all of the watering holes except one drying up. None of the tribes, except the one with the functioning waterhole, have access to water. Waldron argues that under these new conditions the right to the exclusive use of the waterhole held by the tribe that still has water is no longer valid. The

claim that Waldron is making here is that “changing circumstances can have an effect on ownership rights notwithstanding the moral legitimacy of the original appropriation” (Waldron 1992: 24). Waldron formulated his argument to deal with issues related to questions about how historic injustice must be dealt with, but I think his argument is also useful for thinking about how changing circumstances in a society require property rights to be altered.

To see how changing circumstances can affect what is required to bring about a just state of affairs, consider the example of mineral rights. Imagine a group of relatively poor farmers, each of whom owns a parcel of land, including the mineral rights to whatever lies beneath the land. At some point, oil is discovered beneath the land and the fortunes of those in the area change dramatically. Over time, those who become wealthy through their property rights over the oil will have their position in society altered. The institutions for maintaining the background justice of society over time will need to be altered to account for the change in material conditions. To deal with these changes in the material conditions of the society, the state needs to have the ability to change the status of property rights. These changes could be relatively small: it might be possible to simply use an additional tax on the newly wealthy (for example, a capital gains tax) in order to bring about the necessary changes. Alternatively, it might be necessary to bring about significant changes in the rights that regulate the use of property. For example, if it became clear that the best way to improve the long-term prospects of the least-advantaged would be to nationalise mineral resources, then the state would be justified in altering property rights in this way.

Not only the discovery of new resources, but also changes in the use of existing resources, can make it necessary to alter property rights regimes to more closely align the private benefit of using the resource to the public cost of the resource. To explain why this is so I use the example of the fur trade in North America. Before the establishment of a large-scale fur trade in which furs from North America were traded in huge quantities, the native tribes in the area where the furs were harvested used a system of communal property rights to control access to the animals used for harvesting furs (Alchian & Demsetz 1973: 25). In effect, the communal ownership system meant that each individual hunter could take as much as he pleased from the land. Before the large-scale trade in furs developed, this system was adequate because the replenishment rate of the animals that were hunted was approximately equal to the rate at which they were taken. However, once the demand for furs increased, the rate at which animals were harvested began to exceed the natural rate at which they were replenished. In order to avoid a tragedy of the commons situation, the native tribes switched to a form of private ownership.

This form of ownership allowed individual families to control access to the areas where the animals were hunted. This change more closely aligned the private benefits that accrue to the hunter with the cost of maintaining an adequate supply of animals.

A contemporary example is that of tradable carbon permits. What these permits amount to is a form of private property right in the atmosphere. Firms owning these permits are allowed to release a certain amount of carbon dioxide into the atmosphere. Those that are able to reduce the amount of carbon dioxide that they produce to below the level that their permit allows are allowed to sell their remaining ‘pollution quota’ to the highest bidder. The firms that buy the excess quota are those for whom it makes more financial sense to pollute, rather than to invest in technology that reduces their carbon output. The aim of these tradable carbon permits is to more closely link the social cost of productive activities like mining or energy generation, with the private gain that these activities produce.

The point of these examples is to highlight the complex nature of the relationship between property rights and the requirements of justice as fairness. Thinking about property rights requires that we keep in mind the requirements of FEO as well as the difference principle. The examples show that there is no way to decide on a particular property rights system before taking the current conditions and likely future conditions into account. What I have tried to show is that Rawls does not take into account the many ways in which changing circumstances can affect the justness of the property rights system, which precludes any certainty about what would constitute an ideal type of regime. The justness of the basic structure of any society will, in part, be determined by the changing material conditions and economic practices.

What I have tried to show is that the question whether justice as fairness requires a private property system or a collective property rights system is not the right question to ask. The more pertinent questions are: over what range of goods should citizens have private ownership, and what range of goods require collective ownership? The answers to the questions cannot all be decided in advance: they will be determined by the history of the society, present social circumstances, by the difference principle as well as by the likely effect that changes in ownership rights will have on people’s reasonable expectations. In the next section I argue that it is these three considerations that should inform our deliberations about the appropriate property rights system for a given society, and that such deliberations should be conducted within a framework of imperfect procedural justice.

## 4. Property rights and procedural justice

### 4.1 *Pure procedural justice*

I begin this section with an explanation of Rawls's use of pure procedural justice to determine just distributive shares. I then show that, if the difference principle determines the range of goods over which private property rights can be permitted, it makes it difficult to see how Rawls can remain committed to pure procedural justice. My view is that the only way of avoiding this difficulty is to rely on imperfect procedural justice – together with the three other considerations sketched out above – to determine what the just distributive share is that should go to each individual.

Pure procedural justice “is the idea that the outcomes of certain fair procedures, when fully complied with, are necessarily just” (Freeman 2007: 480). Pure procedural justice holds when there is no “criterion defined separately from and prior to the procedure which is to be followed” (Rawls 1999: 74) In other words, if the procedure itself is fair, then the outcome, whatever it turns out to be, must also be fair. As an example, one might think of a coin toss to decide who will serve first in a game of tennis. As long as the coin is a fair one, then the outcome (whatever it may be) is fair.

A large part of the aim of justice as fairness is to provide the moral grounds for establishing a set of institutions that are fair and just. Once these fair and just institutions have been established (and they are complied with), then justice as fairness has nothing else to say about the distribution that might result. Rawls says that “the intuitive idea is to design the social system so that the outcome is just whatever it happens to be, at least so long as it is within a certain range” (Rawls 1999: 75). For the moment I set aside the question of what this ‘certain range’ might be, but will return to it shortly.

To illustrate what is meant by the idea of pure procedural justice, Rawls compares it with perfect and imperfect procedural justice. Perfect procedural justice has two features: i) there is “an independent criterion for what a just distribution is”; and ii) it is possible to “design a procedure that is sure to give the desired outcome” (Rawls 1999: 75) To illustrate what this means, Rawls uses the example of a group of people who need to divide a cake. The just outcome would be that each person get an equal share of cake and the procedure to get to this outcome is to allow one person to divide the cake and allow the others to pick before that person.

Imperfect procedural justice is when there is an independent criterion for a just outcome, but no way of designing a procedure that guarantees the outcome. Rawls uses the example of a criminal trial to explain what imperfect procedural justice means (Rawls 1999: 76). In a trial, there are procedures that need to be followed in order to make sure that the accused is only found guilty if in fact they are guilty. However, it is impossible to design procedures in such a way as to guarantee that it will always be the case that those who are innocent go free and those who are guilty are punished.

Rawls argues that it is pure procedural justice that should govern the distributive share received by each person. He argues that “only against the background of a just basic structure, including a just political constitution and just arrangement of economic and social institutions, can one say that the requisite just procedure exists” (Rawls 1999: 78). His argument is that once the justness of the basic structure has been established it is a matter of pure procedural justice that determines the distributive share going to each person. This was part of the reason for sketching out the institutions of POD. The aim was to show how the consequences of the market could be ‘patterned’ to ensure that it is just by making adjustments at what Thomas calls the ‘macro’ level (Thomas 2012: 13). In other words, if the institutions of the basic structure are just, then the resulting distribution is just, irrespective of what it may be. The advantage of this approach, says Rawls is:

That it is no longer necessary in meeting the demands of justice to keep track of the endless variety of circumstances and the changing relative positions of particular persons. One avoids the problem of defining principles to cope with the enormous complexities which would arise if such details were relevant. (Rawls 1999: 79)

The benefit of this way of dealing with distributive justice is that it makes it much easier to administer. It is not necessary for the state to make fine-grained decisions about which resource will be of most benefit to a particular individual. In a system of pure procedural justice the outcomes that result from cooperation are necessarily just.

The problem with applying the notion of pure procedural justice to the distributive share received by each individual is that it cannot take into account how the difference principle might mandate changes to the institutions of the basic structure in order to make it more just. As I showed in Chapter 3 in my discussion of ideal types and again in this chapter, it may be necessary to alter the status of property rights from time to time to create a more just basic

structure, or, in the case of a perfectly just society, to keep it from becoming unjust. Using the notion of pure procedural justice to determine distributive shares means that the shares would be just, whatever the outcome (subject to certain constraints). This approach to distributive justice is related to what Rawls says about the distribution of resources in a POD taking place *ex ante* rather than *ex post* that was discussed in Chapter 3. By using pure procedural justice to settle distributive shares he seems to assume that the distribution is taking place within a just ‘period’ in the same way that POD requires resources be made available at the beginning of each ‘period’. The problem with this assumption, as was pointed out in the previous chapter, is that economic activity does not take place in discrete periods. It is a continual stream, rather than a game that is played in turns<sup>17</sup>.

My view is that it makes more sense to think of distributive shares in terms of imperfect procedural justice. This would mean that there is a criterion at which we aim, but there is no procedure that can be established to guarantee that the outcome would meet the criterion. In the present case, the criterion being aimed at is the result required by the difference principle, and the procedure is the system of property rights that exist in a given society. In order to achieve the former, the latter would have to be adjusted from time to time so as to take into account the changes brought about by resource use, changing technology and social conditions. Let us take a closer look at the relationship between the difference principle and imperfect procedural justice to see how they influence one another.

Consider the case of property rights in a society in which a just basic structure has been established, but a sudden change in the demand for a particular resource has caused a dramatic shift in the position of the least-advantaged. As an example, consider the possibility that rapid technological change has caused the demand for unskilled labour to decrease dramatically. This has negatively affected the position of the least advantaged and reduced the quantity of primary social goods that they can look forward to over the course of their lives. A change needs to be made to the basic structure of society in order to re-establish justice as fairness.

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<sup>17</sup> The point that I am making here is not that the use of the basic structure to think about the demands of justice should be rejected, but rather that we need to think about how changes to the basic structure can affect distributive justice. Murphy (1999) makes the argument that the distinction between the background structure of society and the rest of the institutions that constitute society, is not tenable. Murphy raises some interesting questions about the demands of justice if this distinction does not hold, but I will not deal with this issue here. I am arguing in favour of the larger Rawlsian project, but against the specific way the question of how a just basic structure can be created and maintained has been dealt with, especially by proponents of POD.



This new state of affairs in which the position of the least-advantaged has worsened, needs to be dealt with. If we begin from the starting point of pure procedural justice, it seems that we are at a loss. All that can be said about pure procedural justice is that it now no longer holds. The outcome is no longer just, but the notion of pure procedural justice offers no remedy for the situation. My view is that pure procedural justice is not the appropriate way to approach the issue of distributive shares because justice as fairness does in fact include a specific criterion of what a just outcome is: the criterion is that the long-term prospects of the least-advantaged are maximised – subject, of course, to the constraints of greatest equal liberty and fair equality of opportunity. If we instead view the question of distributive justice through the lens of imperfect procedural justice it immediately offers us a remedy to the situation. The property rights regime needs to be altered in order to bring about a more just state of affairs.

My view is that the notion of pure procedural justice blinds us to the ways in which any society will go through changes that turn an existing set of just institutions into unjust institutions. The very idea of pure procedural justice turns our thoughts away from the dynamic ways in which societies change and adapt to circumstances. Pure procedural justice asks us to view societies as static entities that simply reproduce themselves over time. This is clearly not the case. In order for justice as fairness to be a guide in creating a just basic structure it needs to be connected to the way in which society can change over time. The best way for justice as fairness to be able to deal with the dynamic change that is central to any society is to replace pure procedural justice as the basis for thinking about the justness of distributive shares and use imperfect procedural justice instead.

The benefit of using the notion of imperfect procedural justice is that it makes it possible to integrate the many factors that have an impact on the justness of the basic structure. It allows for the changing social and material conditions to be taken account of directly. It also allows for the legitimate expectations that citizens have with regards to the institutions of the basic structure to be dealt with in a principled way. The benefit of this approach is that it avoids all of the problems that I have identified with using ideal regime types to decide on the institutions of the basic structure. This is especially true when it comes to discussing the appropriate property rights regime. Instead choosing a set of institutions that are meant to maintain the justness of the basic structure over time, as is the case with using ideal regime types, imperfect procedural justice allows for these institutions to be altered to bring them in line with the requirements of justice.



#### *4.2 Imperfect procedural justice*

In light of the discussion about the way in which the justness of the basic structure can best be maintained, I now want to have another look at the relationship between property rights and justice as fairness. In the previous sections I tried to show how changing demands for resources, the alignment of private benefits and social costs and the development of new technology might alter what is required by justice as fairness. The institutions that work to secure justice as fairness may in time become outdated due to societal changes and require modification or might need to be discarded altogether.

The problem in interpreting Rawls is that understanding the principles of justice requires going back to the veil of ignorance and selecting the principles of justice from the original position and then thinking of the institutions that will best embody them. This results in a ‘static’ interpretation of justice as fairness – because the choice behind the veil of ignorance is a once-off choice it creates the impression that the institutions associated with the principles of justice also need to be chosen once and forever. This is not the case. The choice behind the veil of ignorance is a choice of principles. It is not the choice for the institutions that will embody these principles. The fact that Rawls gradually lifts the veil of ignorance and argues that the institutions of the basic structure will be chosen at the so-called ‘legislative stage’ does not detract from the point that I am trying to make. Different institutions will be chosen depending on the circumstance of the society. This is not the case with the principles themselves.

In the case of the institutions necessary to embody the requirements of the principle of liberty, there is scope for different arrangements to be made, but it is unlikely that changes to these arrangements will need to be made in light of changing circumstances. For example, the system of courts that impose the rule of law and protect the basic liberties will presumably not need to be fundamentally changed due to changes in resource availability or technology. A case might be made that in order to protect the fair value of the political liberties it might be necessary for changes to be made to the way the media interacts with politics. For example, in the United States and in South Africa there are regulations that require that television and radio stations give fair coverage to candidates competing for office. In the age of social media it might be necessary for the state to regulate the ways in which candidates can buy access to potential voters on a social network in order to protect the fair value of the political liberties.

In the case of the institutions that regulate economic rights much more attention must be paid to the historical and social conditions of the society. This means that the process whereby justice

is achieved is dynamic – institutions structured in order to bring about just distribution may do so for a time and then, through changing conditions for which they themselves are responsible, lead to injustice. This means that it will never be possible to set institutions once and for all that will automatically secure justice over time. All that can be done is to try and create and alter institutions guided by the principles of justice. In light of the constantly changing conditions that may affect the justness of the basic structure, it makes far more sense to deal with distributive justice from the perspective of imperfect procedural justice. Imperfect procedural justice recognises that there is a criterion for the right outcome but no single procedure that will guarantee that outcome.

While it is likely that there are several ways in which the institutions of the basic structure can be altered to bring the structure closer to justice as fairness, we need at least some criteria for deciding on a particular course of action (and for ranking different possible courses of action). Simmons (2010: 15-20) proposes at least three such general criteria:

1. The course of action must be morally permissible.
2. The course of action must be practical.
3. The course of action must take into account people's reasonable expectations.

Rawls himself endorses the first two criteria when discussing the role of non-ideal theory. He argues that ideal theory provides a conception of justice for a fully just society, while non-ideal theory “asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for courses of action that are morally permissible and politically possible as well as likely to be effective” (Rawls 1999: 89). Simmons points out that Rawls does not make it clear how these principles for dealing with injustice are to be balanced (Simmons, 2010: 18). Should we first deal with a minor injustice that is relatively simple to address or one that is more serious but far more difficult to resolve? Simmons suggests that “other things being equal, policies are better that are more likely candidates for gaining widespread acceptance and actually bringing about the required institutional changes” (ibid. 19).

The final criterion for deciding on a specific course of action requires us to be mindful of people's reasonable expectations. This means is that the measures adopted to make a society more just must be sensitive to the fact that “people base life plans or important activities on the reasonable expectation that the rules will remain unchanged” (ibid. 20). Being sensitive to the reasonable expectations of citizens means that changes to institutional arrangements should be made incrementally and with sufficient prior warning so that citizens are able to adapt their

expectations. The changes cannot be so drastic as to throw people's life plans into disarray. Again, Rawls himself accepts that we have to take these kinds of considerations into account, arguing that a "distribution cannot be judged in isolation from the system of which it is the outcome or from what individuals have done in good faith in the light of established expectations" (Rawls 1999: 88).

If we were to accept these three criteria, arguments about how justice as fairness applies to non-ideal circumstances, especially to the political economy of a society, would not appeal to ideal types – whether POD or any other – or pure procedural justice. Instead, proponents of justice as fairness would strive to reform institutions on a piecemeal basis. They would not seek to turn their current society into a POD, or any specific type of regime, but would rather seek to change their social structure incrementally – in accordance with the three criteria – into one that meets the requirements of justice as fairness.

We have seen how it is possible that differing social norms, technological changes and resource demands may lead to different prescriptions for institutions to bring about justice as fairness. Over time, these institutions may themselves give rise to new social norms that require them to be altered to bring social cooperation closer to meeting justice as fairness. This raises some difficult questions about the status of property rights. In section 2.1 of this chapter, I argued that the basis for permitting the private ownership over a range of goods would be that the state act as employer of last resort to those who cannot find employment in the private economy. Deciding on the particular range of goods over which to permit private ownership is a difficult question to answer, even when pure procedural justice is replaced by imperfect procedural justice. Given that any changes to the basic structure must take into account the legitimate expectations of citizens, how can the range of goods over which private ownership is permitted be altered without doing damage to the legitimate expectations of those who have property rights?

My view is that there is no way to maintain the justness of a particular property rights system without doing some damage to the legitimate expectations of at least some citizens. This means that whatever property rights system is in place will be inherently unstable and prone to failing to meet the legitimate expectations of those who hold the property rights. This is an unavoidable consequence of trying to create institutions that aim at specific goals while living in a world in which change is constant. Institutions are by definition meant to impose a type of regularity on the world. However, as I have tried to make clear, changing circumstances require that the institutions that are meant to secure justice change as well. This means that the private property

rights established under a particular set of conditions will have to change if the conditions change. This points to a difficulty in applying thinking about how theories of justice are realised by institutions. Dowding argues that “general theory can provide a background, but the specific mechanics of institutions and how they interact with responsibility welfare or equality are questions that cannot be regarded as instantiations of general theory” (Dowding 2013: 630). This means that there is always going to be a gap between the normative force of the principles of justice and the institutional arrangements necessary to manifest those principles. Closing the gap is a constant struggle. There can never be a perfect match between institutions and the demands of justice.

## **Conclusion**

In this chapter, I have argued against attempts to derive a just property rights regime directly from the principles of justice as fairness. I have also tried to show that there might be grounds for permitting private property rights if the state acted as employer of last resort to those who were unable to find work in the private sector. I made it clear that this cannot justify private property rights regimes in all contexts, but that it is a useful first step in approaching the problem of property rights. What this argument showed is that private property rights can be justified only as a part of a larger set of institutions which, working together, guarantee the justness of the basic structure.

In the second part of the chapter I argued that property rights can only ever be provisionally granted. Changing circumstances might require that the property rights regime be altered to restore the justness of the basic structure. I also tried to show that because these changes might need to be made, it makes more sense to use imperfect procedural justice to think about distributive shares, rather than using pure procedural justice, as Rawls does.

The first two findings from this chapter are that (i) it is impossible to derive the right to private property directly from the principles of justice as fairness; (ii) the only way to justify the right to private property would be if the institution of private property formed part of a larger interlocking set of institutions, which working together, secured background justice. Taken together, these findings led me to put forward a new way to approach the issue of distributive justice. This was necessary, because if the institution of private property (or any property right regime for that matter) is inherently unstable, then questions about distributive justice cannot be settled by an appeal to pure procedural justice. In order to deal with this problem, I suggested that pure procedural justice be replaced with imperfect procedural justice. However, the notion

of imperfect procedural justice only shows in the broadest outlines how the issue of deciding on the appropriate institutions of a just basic structure could be settled. To shed more light on this issue, I ended the chapter with a suggestion about how this difficult matter could be approached. I have argued that the route to creating a more just basic structure must begin with non-ideal theory and that a principled approach is necessary for altering institutions in order that they produce outcomes more consistent with the requirements of justice as fairness.

## Conclusion

The aim of this thesis has been to show that ideal regime types, like those used by Rawls and other proponents of POD, should be abandoned by those interested in justice as fairness. Furthermore, I have argued that if ideal regime types are to be abandoned, then supporters of justice as fairness must also abandon the notion of pure procedural justice to settle the question as to how distributive shares are to be allocated. To replace the role that ideal regime types play in Rawls's argument, I presented an alternative approach that is more firmly grounded in the material and social conditions of society. I have also argued that maintaining background justice may require significant alterations to the institutions of the basic structure in light of changing circumstances, and that imperfect procedural justice offers a principled way of making these alterations.

I began with a discussion of the way in which the two principles of justice put forward by Rawls are meant to apply to the institutions of the basic structure. The aim in this first chapter was to make clear that institutions are the means whereby the principles of justice as fairness are operationalised. I also demonstrated that the role of the difference principle is not simply to maximise the position of the least advantaged, but also to tie the notion of reciprocity into the conception of justice put forward by Rawls.

I then evaluated Rawls's arguments in favour of POD as well as his arguments against other regime types. In this discussion, I raised questions about the methodology that underlies the use of ideal regime types, and demonstrated that there are good reasons for thinking that this methodology cannot offer solutions to the problem of deciding which institutional arrangements might best serve justice as fairness. I also evaluated the arguments that Rawls makes against WSC and found that they are not entirely convincing. I argued that this was further proof that the methodology employed by Rawls in arguing for POD is flawed.

In Chapter 3, I built on the arguments about the methodological shortcomings of ideal regime types and argued that using POD to think about the requirements of justice as fairness should be abandoned. To do this, I first showed that two of the core features of POD – the right to private property and the requirement that wealth be relatively equally held – are at odds with one another. This finding, together with the further argument that there is little support for the strongly egalitarian features of POD, led me to reject the use of POD as a means for thinking about how the basic structure of society could best meet the requirements of justice as fairness.

I then demonstrated that a better way of deciding about the institutions of the basic structure would be to abandon ideal theory in favour of non-ideal theory and rely on a principled approach that is grounded in the specific conditions of a given society.

In the fourth and final chapter, I returned to the relationship between the right to private property and justice as fairness. The aim here was to offer a new point of departure for thinking about property rights. In the preceding chapters, I had demonstrated that the assumption on the part of proponents of POD that the right to private property is compatible with justice as fairness is mistaken. In this final chapter, I showed that the right to private property could not be justified by appealing to either the principle of liberty or the difference principle, but that such a right could only be justified if the institution of private property formed part of a larger set of interlocking institutions, which, taken together, guaranteed the justness of the basic structure.

Bringing all of this together, I then argued that the institutions of the basic structure, especially the institution of private property, may need to be adapted to take account of changing circumstances. In that case, the question of distributive justice could not be settled by an appeal to pure procedural justice and should be abandoned in favour of imperfect procedural justice. To conclude, I argued that any attempt to create a more just basic structure must be practically possible within the prevailing political conditions, and must take people's reasonable expectations into account.

The reader might now ask: How does all of the above help us resolve the question of the kind of property rights regime that is most compatible with justice as fairness? The main finding of the thesis, however, is that this is the wrong question to ask. The better question is: How can a just basic structure be created and maintained over time in a principled way? In the course of the first three chapters, I have tried to show that the first question is informed by a series of unjustified assumptions that generate unreliable results. Theorising about the merits of a hypothetical POD and comparing them favourably with the shortcomings of an uncharitable description of WSC does little to further the aim of creating a more just basic structure for the society that we live in.

The conclusion is that the road to creating a more just basic structure in a society lies not in theorising about ideal institutional arrangements, but rather in reasoning that is deeply rooted in the history, politics, and material conditions of that society. It is a mistake to think that questions about the appropriate property rights regime for a just society can be settled by

abstract philosophical reasoning. Answers to these kinds of questions can only be *guided* by a conception of justice (for example, justice as fairness); they cannot be *derived* from it. To accept this conclusion is to accept a more modest role for political philosophy: working out the conceptual and normative framework within which questions about property rights can be answered, instead of trying – and failing – to answer these questions themselves.



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